

UNITED STATES DEPARTMENT OF THE INTERIOR

Stewart L. Udall, *Secretary*

Frank J. Barry, *Solicitor*

**DECISIONS
OF THE
UNITED STATES
DEPARTMENT OF THE INTERIOR**

Edited by
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Vera E. Burgin



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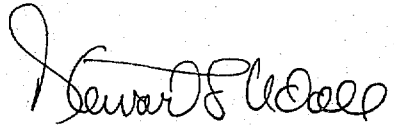
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LAND MANAGEMENT

PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1961, to December 31, 1961. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable Stewart L. Udall served as Secretary of the Interior during the period covered by this volume; Mr. James K. Carr served as Under Secretary; Messrs. Frank P. Briggs, John A. Carver, Kenneth Holum, and John M. Kelly served as Assistant Secretaries of the Interior; Mr. D. Otis Beasley served as Administrative Assistant Secretary; Mr. Frank J. Barry served as Solicitor of the Department of the Interior. Mr. Edward W. Fisher served as Deputy Solicitor.

This volume will be cited within the Department of the Interior as "68 I.D."

A handwritten signature in dark ink, reading "Stewart L. Udall". The signature is fluid and cursive, with the first name "Stewart" being more prominent and the last name "Udall" following in a similar style.

Secretary of the Interior.

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ERRATA

- Page 1—Heading omitted, should read *Decisions of the Department of the Interior*.
- Page 13—Line 16 *Findings of Fact and Decision*, should read *Findings of Fact and Decision*.
- Page 89—Lines 25 and 26 should be struck out—omitted; and line 27, which has (5th word) “*ony*” should read “*only*.”
- Pages 75 and 76—Heading *Estate of Elaine Looking and George Looking* should read *Estates of Elaine Looking and George Looking*.
- Page 132—Footnote 39, *General Excavating Company, IBCA-188, August 15, 1961*, should read *General Excavating Company, IBCA-188, August 15, 1960*.
- Page 142—Line 28 *Truar Machine and Tool Company*, should read *Truax Machine and Tool Company*.
- Page 152—Footnote 2, 4th line *St. Louis-S.F. Ry. Co. v. Van Hoy*, 268 1 p. 2d 582, 584-85 (Okla. 1954) should read *St. Louis-S.F. Ry. Co. v. Van Hoy*, 268 P. 2d 582, 584-85 (Okla. 1954).
- Page 153—Footnote 2, lines 1 & 2 *Thompson v. Updegraff*, 255 1 p. 2d 912, 913 (Okla. 1953); cf. *Alaska Freight Lines v. Harry*, 220 1 F. 2d 272, 275 (9th Cir. 1955) should read *Thompson v. Updegraff*, 255 P. 2d 912, 913 (Okla. 1953); cf. *Alaska Freight Lines v. Harry*, 220 F. 2d 272, 275 (9th Cir. 1955).
- Page 167—Footnote 2, lines 4 and 5 *La Voie Laboratories, Inc., ASBCA 3796 (January 8, 1959)*, 59-1 BCA par. 2017, should read *La Voie Laboratories, Inc., ASBCA 3796 (January 8, 1959)* 59-1 BCA par. 2071.
- Page 188—Bottom of page, colon should follow the word *carriers*.
- Page 195—Line 24, *On October 16, 1961*, should read *On October 16, 1951*.
- Page 195—Footnote 1, 300 CFR, should read 30 CFR.
- Page 216—Footnote 6, Line 2, *L. D. Shilling Co., IBAC-23 (Supp.)*, should read *L. D. Shilling Co., IBCA-23 (Supp.)*.
- Page 219—4 Lines from bottom, *some of the pervious strata * * ** should read, *some of the previous strata * * **.
- Page 275—Line 18 (*Solicitor Memorandum*) should read, (*Solicitor Memorandum*).
- Page 372—Line 12 *predetermined prices is not effected*, should read *predetermined prices is not affected*.
- Page 389—Lines 25 and 26, *U.S. v. Brown*, 330 U.S. 18, 27, should read, *U.S. v. Brown*, 333 U.S. 18, 27.

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Max Barash, The Texas Company, 63 I.D. 51 (1956)

Max Barash v. Douglas McKay, Civil Action No. 939-56. Judgment for defendant, June 13, 1957; reversed and remanded, 256 F. 2d 714 (1958); judgment for plaintiff, December 18, 1958, U.S. Dist. Ct. D.C., 66 I.D. 11 (1959).

The California Company, 66 I.D. 54 (1959)

The California Company v. Stewart L. Udall, Civil Action No. 980-59. Judgment for defendant, October 24, 1960 (opinion). Affirmed, 296 F. 2d 384 (1961).

Columbian Carbon Company, Merwin E. Liss, 63 I.D. 166 (1956)

Merwin E. Liss v. Fred A. Seaton, Civil Action No. 3233-56. Judgment for defendant, January 9, 1958. Appeal dismissed for want of prosecution, September 18, 1958, D.C. Cir. No. 14,647.

John C. deArmas, Jr., P. A. McKenna, 63 I.D. 82 (1956)

Patrick A. McKenna v. Clarence A. Davis, Civil Action No. 2125-56. Judgment for defendant, June 20, 1957; affd, 259 F. 2d 780 (1958); cert. denied, 358 U.S. 835 (1958).

John J. Farrelly et al., 62 I.D. 1 (1955)

John J. Farrelly and The Fifty-One Oil Co. v. Douglas McKay, Civil Action No. 3037-55. Judgment for plaintiff, October 11, 1955; no appeal.

Franco Western Oil Company et al., 65 I.D. 316, 427 (1958)

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- Bosch, Gottlieb (8 L.D. 45); overruled, 13 L.D. 42.
- Box *v.* Ulstein (3 L.D. 143); overruled, 6 L.D. 217.
- Boyle, William (38 L.D. 603); overruled so far as in conflict, 44 L.D. 331.
- Braasch, William C., and Christ C. Prange (48 L.D. 448); overruled so far as in conflict, 60 L.D. 417, 419.
- Bradford, J. L. (31 L.D. 132); overruled, 35 L.D. 399.
- Bradstreet et al. *v.* Rehm (21 L.D. 30); reversed, 21 L.D. 544.
- Brady *v.* Southern Pacific R.R. Co. (5 L.D. 407 and 658); overruled, 20 L.D. 259.
- Brandt, William W. (31 L.D. 277); overruled, 50 L.D. 161.
- Braucht et al. *v.* Northern Pacific Ry. Co. et al. (43 L.D. 536); modified, 44 L.D. 225.
- Brayton, Homer E. (31 L.D. 364); overruled so far as in conflict, 51 L.D. 305.
- Brick Pomeroy Mill Site (34 L.D. 320); overruled, 37 L.D. 674.
- *Brown, Joseph T. (21 L.D. 47); overruled so far as in conflict, 31 L.D. 222. (See 35 L.D. 399.)
- Brown *v.* Cagle (30 L.D. 8); vacated, 30 L.D. 148. (See 47 L.D. 406.)
- Browning, John W. (42 L.D. 1); overruled so far as in conflict, 43 L.D. 342.
- Bruns, Henry A. (15 L.D. 170); overruled so far as in conflict, 51 L.D. 454.
- Bundy *v.* Livingston (1 L.D. 152); overruled, 6 L.D. 284.
- Burdick, Charles W. (34 L.D. 345); modified, 42 L.D. 472.
- Burgess, Allen L. (24 L.D. 11); overruled so far as in conflict, 42 L.D. 321.
- Burkholder *v.* Skagen (4 L.D. 166); overruled, 9 L.D. 153.
- Burnham Chemical Co. *v.* United States Borax Co. et al. (54 L.D. 183); overruled in substance, 58 L.D. 426, 429.
- Burns, Frank (10 L.D. 365); overruled so far as in conflict, 51 L.D. 454.
- Burns *v.* Bergh's Heirs (37 L.D. 161); vacated, 51 L.D. 268.
- Buttery *v.* Sprout (2 L.D. 293); overruled, 5 L.D. 591.
- Cagle *v.* Mendenhall (20 L.D. 447); overruled, 23 L.D. 533.
- Cain et al. *v.* Addenda Mining Co. (24 L.D. 18); vacated, 29 L.D. 62.
- California and Oregon Land Co. (21 L.D. 344); overruled, 26 L.D. 453.
- California, State of (14 L.D. 253); vacated, 23 L.D. 230.
- California, State of (15 L.D. 10); overruled, 23 L.D. 423.
- California, State of (19 L.D. 585); vacated, 28 L.D. 57.
- California, State of (22 L.D. 428); overruled, 32 L.D. 34.
- California, State of (32 L.D. 346); vacated, 50 L.D. 628. (See 37 L.D. 499 and 46 L.D. 396.)
- California, State of (44 L.D. 118); overruled, 48 L.D. 98.
- California, State of (44 L.D. 468); overruled, 48 L.D. 98.
- California, State of *v.* Moccettini (19 L.D. 359); overruled, 31 L.D. 335.
- California, State of *v.* Pierce (9 C.L.O. 118); modified, 2 L.D. 854.
- California, State of *v.* Smith (5 L.D. 543); overruled, 18 L.D. 343.
- Call *v.* Swain (3 L.D. 46); overruled, 18 L.D. 373.
- Cameron Lode (13 L.D. 369); overruled so far as in conflict, 25 L.D. 518.
- Camplan *v.* Northern Pacific R.R. Co. (28 L.D. 118); overruled so far as in conflict, 29 L.D. 550.

- Case *v. Church* (17 L.D. 578); overruled, 26 L.D. 453.
- Case *v. Kupferschmidt* (30 L.D. 9); overruled so far as in conflict, 47 L.D. 406.
- Castello *v. Bonnie* (20 L.D. 311); overruled, 22 L.D. 174.
- Cate *v. Northern Pacific Ry. Co.* (41 L.D. 316); overruled so far as in conflict, 43 L.D. 60.
- Cawood *v. Dumas* (22 L.D. 585); vacated, 25 L.D. 526.
- Centerville Mining and Milling Co. (39 L.D. 80); no longer controlling, 48 L.D. 17.
- Central Pacific R.R. Co. (29 L.D. 589); modified, 48 L.D. 58.
- Central Pacific R.R. Co. *v. Orr* (2 L.D. 525); overruled, 11 L.D. 445.
- Chapman *v. Willamette Valley and Cascade Mountain Wagon Road Co.* (13 L.D. 61); overruled, 20 L.D. 259.
- Chappell *v. Clark* (27 L.D. 334); modified, 27 L.D. 532.
- Chicago Placer Mining Claim (34 L.D. 9); overruled, 42 L.D. 453.
- Childress et al. *v. Smith* (15 L.D. 89); overruled, 26 L.D. 453.
- Chittenden, Frank O., and Interstate Oil Corp. (50 L.D. 262); overruled so far as in conflict, 53 L.D. 228.
- Christofferson, Peter (3 L.D. 329); modified, 6 L.D. 284, 624.
- Claffin *v. Thompson* (28 L.D. 279); overruled, 29 L.D. 693.
- Claney *v. Ragland* (38 L.D. 550). (See 43 L.D. 485.)
- Clark, Yulu S. et al. (A-22852) February 20, 1941, unreported; overruled so far as in conflict, 59 I.D. 258, 260.
- Clarke, C. W. (32 L.D. 233); overruled so far as in conflict, 51 L.D. 51.
- Cline *v. Urban* (29 L.D. 96); overruled, 46 L.D. 492.
- Clipper Mining Co. (22 L.D. 527); no longer followed in part, 66 I.D. 417.
- Cochran *v. Dwyer* (9 L.D. 478). (See 39 L.D. 162, 225.)
- Coffin, Edgar A. (33 L.D. 245); overruled so far as in conflict, 52 L.D. 153.
- Coffin, Mary E. (34 L.D. 564); overruled so far as in conflict, 51 L.D. 51.
- Colorado, State of (7 L.D. 490); overruled, 9 L.D. 408.
- Condict, W. C. et al. (A-23366) June 24, 1942, unreported; overruled so far as in conflict, 59 L.D. 258-260.
- Cook, Thomas C. (10 L.D. 324). (See 39 L.D. 162, 225.)
- Cooke *v. Villa* (17 L.D. 210); vacated, 19 L.D. 442.
- Cooper, John W. (15 L.D. 285); overruled, 25 L.D. 113.
- Copper Bullion and Morning Star Lode Mining Claims (35 L.D. 27). (See 39 L.D. 574.)
- Copper Glance Lode (29 L.D. 542); overruled so far as in conflict, 55 L.D. 348.
- Corlis *v. Northern Pacific R.R. Co.* (23 L.D. 265); vacated, 26 L.D. 652.
- Cornell *v. Chilton* (1 L.D. 153); overruled, 6 L.D. 483.
- Cowles *v. Huff* (24 L.D. 81); modified 28 L.D. 515.
- Cox, Allen H. (30 L.D. 90, 468); vacated, 31 L.D. 114.
- Crowston *v. Seal* (5 L.D. 213); overruled, 18 L.D. 586.
- Culligan *v. State of Minnesota* (34 L.D. 22); modified, 34 L.D. 151.
- Cunningham, John (32 L.D. 207); modified, 32 L.D. 456.
- Dailey Clay Products Co., The (48 L.D. 429, 431); overruled so far as in conflict, 50 L.D. 656.
- Dakota Central R.R. Co. *v. Downey* (8 L.D. 115); modified, 20 L.D. 131.
- Davis, Heirs of (40 L.D. 573); overruled, 46 L.D. 110.
- DeLong *v. Clarke* (41 L.D. 278); modified so far as in conflict, 45 L.D. 54.
- Dempsey, Charles H. (42 L.D. 215); modified, 43 L.D. 300.
- Denison and Willits (11 C.L.O. 261); overruled so far as in conflict, 26 L.D. 122.
- Deseret Irrigation Co. et al *v. Sevier River Land and Water Co.* (40 L.D. 463); overruled, 51 L.D. 27.

- Devoe, Lizzie A. (5 L.D. 4) ; modified, 5 L.D. 429.
- Dickey, Ella I. (22 L.D. 351) ; overruled, 32 L.D. 331.
- Dierks, Herbert (36 L.D. 367) ; overruled by the unreported case of Thomas J. Guigham, March 11, 1909.
- Dixon v. Dry Gulch Irrigation Co. (45 L.D. 4) ; overruled, 51 L.D. 27.
- Douglas and Other Lodes (34 L.D. 556) ; modified, 43 L.D. 128.
- Downman v. Moss (19 L.D. 526) ; overruled, 25 L.D. 82.
- Dudymott v. Kansas Pacific R.R. Co. (5 C.L.O. 69) ; overruled so far as in conflict, 1 L.D. 345.
- Dunphy, Elijah M. (8 L.D. 102) ; overruled so far as in conflict, 36 L.D. 561.
- Dyche v. Beleele (24 L.D. 494) ; modified, 43 L.D. 56.
- Dysart, Francis J. (23 L.D. 282) ; modified, 25 L.D. 188.
- Easton, Francis E. (27 L.D. 600) ; overruled, 30 L.D. 355.
- East Tintic Consolidated Mining Co. (41 L.D. 255) ; vacated, 43 L.D. 80.
- *Elliott v. Ryan (7 L.D. 322) ; overruled, 8 L.D. 110. (See 9 L.D. 360.)
- El Paso Brick Co. (37 L.D. 155) ; overruled so far as in conflict, 40 L.D. 199.
- Elson, William C. (6 L.D. 797) ; overruled, 37 L.D. 330.
- Emblem v. Weed (16 L.D. 28) ; modified, 17 L.D. 220.
- Epley v. Trick (8 L.D. 110) ; overruled, 9 L.D. 360.
- Erhardt, Finsans (36 L.D. 154) ; overruled, 38 L.D. 406.
- Esping v. Johnson (37 L.D. 709) ; overruled, 41 L.D. 289.
- Ewing v. Rickard (1 L.D. 146) ; overruled, 6 L.D. 483.
- Falconer v. Price (19 L.D. 167) ; overruled, 24 L.D. 264.
- Fargo No. 2 Lode Claims (37 L.D. 404) ; modified, 43 L.D. 128 ; overruled so far as in conflict, 55 L.D. 348.
- Farrill, John W. (13 L.D. 713) ; overruled so far as in conflict, 52 L.D. 473.
- Febes, James H. (37 L.D. 210) ; overruled, 43 L.D. 183.
- Federal Shale Oil Co. (53 L.D. 213) ; overruled so far as in conflict, 55 L.D. 290.
- Ferrell et al. v. Hoge et al. (18 L.D. 81) ; overruled, 25 L.D. 351.
- Fette v. Christiansen (29 L.D. 710) ; overruled, 34 L.D. 167.
- Field, William C. (1 L.D. 68) ; overruled so far as in conflict, 52 L.D. 473.
- Filtrol Company v. Brittan and Echart (51 L.D. 649) ; distinguished, 55 L.D. 605.
- Fish, Mary (10 L.D. 606) ; modified, 13 L.D. 511.
- Fisher v. Heirs of Rule (42 L.D. 62, 64) ; vacated, 43 L.D. 217.
- Fitch v. Sioux City and Pacific R.R. Co. (216 L. and R. 184) ; overruled, 17 L.D. 43.
- Fleming v. Bowe (13 L.D. 78) ; overruled, 23 L.D. 175.
- Florida, State of (17 L.D. 355) ; reversed, 19 L.D. 76.
- Florida, State of (47 L.D. 92, 93) ; overruled so far as in conflict, 51 L.D. 291.
- Florida Mesa Ditch Co. (14 L.D. 265) ; overruled, 27 L.D. 421.
- Florida Railway and Navigation Co. v. Miller (3 L.D. 324) ; modified, 6 L.D. 716 ; overruled, 9 L.D. 237.
- Forgeot, Margaret (7 L.D. 280) ; overruled, 10 L.D. 629.
- Fort Boise Hay Reservation (6 L.D. 16) ; overruled, 27 L.D. 505.
- Freeman, Flossie (40 L.D. 106) ; overruled, 41 L.D. 63.
- Freeman v. Texas and Pacific Ry. Co. (2 L.D. 550) ; overruled, 7 L.D. 18.
- Fry, Silas A. (45 L.D. 20) ; modified, 51 L.D. 581.
- Galliher, Maria (8 C.L.O. 137) ; overruled, 1 L.D. 57.

- Gallup *v.* Northern Pacific Ry. Co. (unpublished); overruled so far as in conflict, 47 L.D. 304.
- Gariss *v.* Borin (21 L.D. 542). (See 39 L.D. 162, 225.)
- Garrett, Joshua (7 C.L.O. 55); overruled, 5 L.D. 158.
- Garvey *v.* Tuiska (41 L.D. 510); modified, 43 L.D. 229.
- Gates *v.* California and Oregon R.R. Co. (5 C.L.O. 150); overruled, 1 L.D. 336.
- Gauger, Henry (10 L.D. 221); overruled, 24 L.D. 81.
- Gleason *v.* Pent (14 L.D. 375; 15 L.D. 286); vacated, 53 L.D. 447; overruled so far as in conflict, 59 L.D. 416, 422.
- Gohrman *v.* Ford (8 C.L.O. 6); overruled so far as in conflict, 4 L.D. 580.
- Golden Chief "A" Placer Claim (35 L.D. 557); modified, 37 L.D. 250.
- Goldstein *v.* Juneau Townsite (23 L.D. 417); vacated, 31 L.D. 88.
- Goodale *v.* Olney (12 L.D. 324); distinguished, 55 L.D. 580.
- Gotebo Townsite *v.* Jones (35 L.D. 18); modified, 37 L.D. 560.
- Gowdy *v.* Connell (27 L.D. 56); vacated, 28 L.D. 240.
- Gowdy *v.* Gilbert (19 L.D. 17); overruled, 26 L.D. 453.
- Gowdy et al. *v.* Kismet Gold Mining Co. (22 L.D. 624); modified, 24 L.D. 191.
- Grampian Lode (1 L.D. 544); overruled, 25 L.D. 495.
- Gregg et al. *v.* State of Colorado (15 L.D. 151); modified, 30 L.D. 310.
- Grinnell *v.* Southern Pacific R.R. Co. (22 L.D. 438); vacated, 23 L.D. 489.
- *Ground Hog Lode *v.* Parole and Morning Star Lodes (8 L.D. 430); overruled, 34 L.D. 568. (See R.R. Rousseau, 47 L.D. 590.)
- Guidney, Alcide (8 C.L.O. 157); overruled, 40 L.D. 399.
- Gulf and Ship Island R.R. Co. (16 L.D. 236); modified, 19 L.D. 534.
- Gustafson, Olof (45 L.D. 456); modified, 46 L.D. 442.
- Gwyn, James R. (A-26806) - December 17, 1953, unreported; distinguished, 66 L.D. 275.
- Halvorson, Halvor K. (39 L.D. 456); overruled, 41 L.D. 505.
- Hansbrough, Henry C. (5 L.D. 155); overruled, 29 L.D. 59.
- Hardee, D. C. (7 L.D. 1); overruled so far as in conflict, 29 L.D. 698.
- Hardee *v.* United States (8 L.D. 391; 16 L.D. 499); overruled so far as in conflict, 29 L.D. 689.
- Hardin, James A. (10 L.D. 313); revoked, 14 L.D. 233.
- Harris, James G. (28 L.D. 90); overruled, 39 L.D. 93.
- Harrison, Luther (4 L.D. 179); overruled, 17 L.D. 216.
- Harrison, W. R. (19 L.D. 299); overruled, 33 L.D. 539.
- Hart *v.* Cox (42 L.D. 592); vacated, 260 U.S. 427. (See 49 L.D. 413.)
- Hastings and Dakota Ry. Co. *v.* Christenson et al. (22 L.D. 257); overruled, 28 L.D. 572.
- Hausman, Peter A. C. (37 L.D. 352); modified, 48 L.D. 629.
- Hayden *v.* Jamison (24 L.D. 403); vacated, 26 L.D. 373.
- Haynes *v.* Smith (50 L.D. 208); overruled so far as in conflict, 54 L.D. 150.
- Heilman *v.* Syverson (15 L.D. 184); overruled, 23 L.D. 119.
- Heinzman et al. *v.* Letroadec's Heirs et al. (28 L.D. 497); overruled, 38 L.D. 253.
- Heirs of Davis (40 L.D. 573); overruled, 46 L.D. 110.
- Heirs of Philip Mulnix (33 L.D. 331); overruled, 43 L.D. 532.
- *Heirs of Stevenson *v.* Cunningham (32 L.D. 650); overruled so far as in conflict, 41 L.D. 119. (See 43 L.D. 196.)
- Heirs of Talkington *v.* Hempfling (2 L.D. 46); overruled, 14 L.D. 200.
- Heirs of Vradenberg et al. *v.* Orr et al. (25 L.D. 232); overruled, 38 L.D. 253.

- Helmer, Inkerman (34 L.D. 341) ; modified, 42 L.D. 472.
- Helphrey v. Coil (49 L.D. 624) ; overruled, Dennis v. Jean (A-20899), July 24, 1937, unreported.
- Henderson, John W. (40 L.D. 518) ; vacated, 43 L.D. 106. (See 44 L.D. 112, and 49 L.D. 484.)
- Hennig, Nellie J. (38 L.D. 443, 445) ; recalled and vacated, 39 L.D. 211.
- Hensel, Ohmer V. (45 L.D. 557) ; distinguished, 66 I.D. 275.
- Herman v. Chase et al. (37 L.D. 590) ; overruled, 43 L.D. 246.
- Herrick, Wallace H. (24 L.D. 23) ; overruled, 25 L.D. 113.
- Hess, Hoy, Assignee (46 L.D. 421) ; overruled, 51 L.D. 287.
- Hickey, M. A., et al. (3 L.D. 83) ; modified, 5 L.D. 256.
- Hildreth, Henry (45 L.D. 464) ; vacated, 46 L.D. 17.
- Hindman, Ada I. (42 L.D. 327) ; vacated in part, 43 L.D. 191.
- Hoglund, Svan (42 L.D. 405) ; vacated, 43 L.D. 538.
- Holden, Thomas A. (16 L.D. 493) ; overruled, 29 L.D. 166.
- Holland, G. W. (6 L.D. 20) ; overruled, 6 L.D. 639; 12 L.D. 436.
- Holland, William C. (M-27696), decided April 26, 1934; overruled in part, 55 I.D. 221.
- Hollensteiner, Walter (38 L.D. 319) ; overruled, 47 L.D. 260.
- Holman v. Central Montana Mines Co. (34 L.D. 568) ; overruled so far as in conflict, 47 L.D. 590.
- Hon v. Martinas (41 L.D. 119) ; modified, 43 L.D. 197.
- Hooper, Henry (6 L.D. 624) ; modified, 9 L.D. 86, 284.
- Howard, Thomas (3 L.D. 409). (See 39 L.D. 162, 225.)
- Howard v. Northern Pacific R.R. Co. (23 L.D. 6) ; overruled, 28 L.D. 126.
- Howell, John H. (24 L.D. 35) ; overruled, 28 L.D. 204.
- Howell, L. C. (39 L.D. 92). (See 39 L.D. 411.)
- Hoy, Assignee of Hess (46 L.D. 421) ; overruled, 51 L.D. 287.
- Hughes v. Greathead (43 L.D. 497) ; overruled, 49 L.D. 413. (See 260 U.S. 427.)
- Hull et al. v. Ingle (24 L.D. 214) ; overruled, 30 L.D. 258.
- Huls, Clara (9 L.D. 401) ; modified, 21 L.D. 377.
- Humble Oil & Refining Co. (64 I.D. 5) ; distinguished, 65 I.D. 316.
- Hunter, Charles H. (60 I.D. 395) ; distinguished, 63 I.D. 65.
- Hurley, Bertha C. (TA-66 (Ir.)), March 21, 1952, unreported; overruled, 62 I.D. 12.
- Hyde, F. A. (27 L.D. 472) ; vacated, 28 L.D. 284.
- Hyde, F. A. et al. (40 L.D. 284) ; overruled, 43 L.D. 381.
- Hyde et al. v. Warren et al. (14 L.D. 576; 15 L.D. 415). (See 19 L.D. 64.)
- Ingram, John D. (37 L.D. 475). (See 43 L.D. 544.)
- Inman v. Northern Pacific R.R. Co. (24 L.D. 318) ; overruled, 28 L.D. 95.
- Interstate Oil Corp. and Frank O. Chittenden (50 L.D. 262) ; overruled so far as in conflict, 53 I.D. 228.
- Instructions (32 L.D. 604) ; overruled so far as in conflict, 50 L.D. 628; 53 I.D. 365; Lillian M. Peterson et al. (A-20411), August 5, 1937, unreported. (See 59 I.D. 282, 286.)
- Instructions (51 L.D. 51) ; overruled so far as in conflict, 54 I.D. 36.
- Iowa Railroad Land Co. (23 L.D. 79; 24 L.D. 125) ; vacated, 29 L.D. 79.
- Jacks v. Belard et al. (29 L.D. 369) ; vacated, 30 L.D. 345.
- Jackson Oil Co. v. Southern Pacific Ry. Co. (40 L.D. 528) ; overruled, 42 L.D. 317.
- Johnson v. South Dakota (17 L.D. 411) ; overruled so far as in conflict, 41 L.D. 22.
- Jones, James A. (3 L.D. 176) ; overruled, 8 L.D. 448.
- Jones v. Kennett (6 L.D. 688) ; overruled, 14 L.D. 429.

- Kackmann, Peter (1 L.D. 86); overruled, 16 L.D. 464.
- Kanawha Oil and Gas Co., Assignee (50 L.D. 639); overruled so far as in conflict, 54 L.D. 371.
- Kemp, Frank A. (47 L.D. 560); overruled so far as in conflict, 60 L.D. 417, 419.
- Kemper v. St. Paul and Pacific R.R. Co. (2 C.L.L. 805); overruled, 18 L.D. 101.
- Kilner, Harold E., et al. (A-21845); February 1, 1939, unreported; overruled so far as in conflict, 59 L.D. 258, 260.
- King v. Eastern Oregon Land Co. (23 L.D. 579); modified, 30 L.D. 19.
- Kinney, E. C. (44 L.D. 580); overruled so far as in conflict, 53 L.D. 228.
- Kinsinger v. Peck (11 L.D. 202). (See 39 L.D. 162, 225.)
- Kiser v. Keech (7 L.D. 25); overruled, 23 L.D. 119.
- Knight, Albert B., et al. (30 L.D. 227); overruled, 31 L.D. 64.
- Knight v. Heirs of Knight (39 L.D. 362, 491; 40 L.D. 461); overruled, 43 L.D. 242.
- Kniskern v. Hastings and Dakota R. Co. (6 C.L.O. 50); overruled, 1 L.D. 362.
- Kolberg, Peter F. (37 L.D. 453); overruled, 43 L.D. 181.
- Krigbaum, James T. (12 L.D. 617); overruled, 26 L.D. 448.
- Krushnic, Emil L. (52 L.D. 282, 295); vacated, 53 L.D. 42, 45. (See 280 U.S. 306.)
- Lackawanna Placer Claim (36 L.D. 36); overruled, 37 L.D. 715.
- La Follette, Harvey M. (26 L.D. 453); overruled so far as in conflict, 59 L.D. 416, 422.
- Lamb v. Ullery (10 L.D. 528); overruled, 32 L.D. 331.
- Largent, Edward B., et al. (13 L.D. 397); overruled so far as in conflict, 42 L.D. 321.
- Larson, Syvert (40 L.D. 69); overruled, 43 L.D. 242.
- Lasselle v. Missouri, Kansas and Texas Ry. Co. (3 C.L.O. 10); overruled, 14 L.D. 278.
- Las Vegas Grant (13 L.D. 646; 15 L.D. 58); revoked, 27 L.D. 683.
- Laughlin, Allen (31 L.D. 256); overruled, 41 L.D. 361.
- Laughlin v. Martin (18 L.D. 112); modified, 21 L.D. 40.
- Law v. State of Utah (29 L.D. 623); overruled, 47 L.D. 359.
- Lemmons, Lawson H. (19 L.D. 37); overruled, 26 L.D. 398.
- Leonard, Sarah (1 L.D. 41); overruled, 16 L.D. 464.
- Lindberg, Anna C. (3 L.D. 95); modified, 4 L.D. 299.
- Linderman v. Wait (6 L.D. 689); overruled, 13 L.D. 459.
- *Linhart v. Santa Fe Pacific R.R. Co. (36 L.D. 41); overruled, 41 L.D. 284. (See 43 L.D. 536.)
- Little Pet Lode (4 L.D. 17); overruled, 25 L.D. 550.
- Lock Lode (6 L.D. 105); overruled so far as in conflict, 26 L.D. 123.
- Lockwood, Francis A. (20 L.D. 361); modified, 21 L.D. 200.
- Lonergan v. Shockley (33 L.D. 238); overruled so far as in conflict, 34 L.D. 314; 36 L.D. 199.
- Louisiana, State of (8 L.D. 126); modified, 9 L.D. 157.
- Louisiana, State of (24 L.D. 231); vacated, 26 L.D. 5.
- Louisiana, State of (47 L.D. 366); overruled so far as in conflict, 51 L.D. 291.
- Louisiana, State of (48 L.D. 201); overruled so far as in conflict, 51 L.D. 291.
- Lucy B. Hussey Lode (5 L.D. 93); overruled, 25 L.D. 495.
- Luton, James W. (34 L.D. 468); overruled so far as in conflict, 35 L.D. 102.
- Lyman, Mary O. (24 L.D. 493); overruled so far as in conflict, 43 L.D. 221.
- Lynch, Patrick (7 L.D. 33); overruled so far as in conflict, 13 L.D. 13.

- Madigan, Thomas (8 L.D. 188); overruled, 27 L.D. 448.
- Maginnis, Charles P. (31 L.D. 222); overruled, 35 L.D. 399.
- Maginnis, John S. (32 L.D. 14); modified, 42 L.D. 472.
- Maher, John M. (34 L.D. 342); modified, 42 L.D. 472.
- Mahoney, Timothy (41 L.D. 129); overruled, 42 L.D. 313.
- Makela, Charles (46 L.D. 509); extended, 49 L.D. 244.
- Makemson v. Snider's Heirs (22 L.D. 511); overruled, 32 L.D. 650.
- Malone Land and Water Co. (41 L.D. 138); overruled in part, 43 L.D. 110.
- Maney, John J. (35 L.D. 250); modified, 48 L.D. 153.
- Maple, Frank (37 L.D. 107); overruled, 43 L.D. 181.
- Martin v. Patrick (41 L.D. 284); overruled, 43 L.D. 536.
- Mason v. Cromwell (24 L.D. 248); vacated, 26 L.D. 369.
- Masten, E. C. (22 L.D. 337); overruled, 25 L.D. 111.
- Mather et al. v. Hackley's Heirs (15 L.D. 487); vacated, 19 L.D. 48.
- Maughan, George W. (1 L.D. 25); overruled, 7 L.D. 94.
- Maxwell and Sangre de Cristo Land Grants (46 L.D. 301); modified, 48 L.D. 88.
- McBride v. Secretary of the Interior (8 C.L.O. 10); modified, 52 L.D. 33.
- McCalla v. Acker (29 L.D. 203); vacated, 30 L.D. 277.
- McCord, W. E. (23 L.D. 137); overruled to extent of any possible inconsistency, 56 I.D. 73.
- McCornick, William S. (41 L.D. 661, 666); vacated, 43 L.D. 429.
- *McCraney v. Heirs of Hayes (33 L.D. 21); overruled so far as in conflict, 41 L.D. 119. (See 43 L.D. 196.)
- McDonald, Roy (34 L.D. 21); overruled, 37 L.D. 285.
- *McDonogh School Fund (11 L.D. 378); overruled, 30 L.D. 616. (See 35 L.D. 399.)
- McFadden et al. v. Mountain View Mining and Milling Co. (26 L.D. 530); vacated, 27 L.D. 358.
- McGee, Edward D. (17 L.D. 285); overruled, 29 L.D. 166.
- McGrann, Owen (5 L.D. 10); overruled, 24 L.D. 502.
- McGregor, Carl (37 L.D. 693); overruled, 38 L.D. 148.
- McHarry v. Stewart (9 L.D. 344); criticized and distinguished, 56 I.D. 340.
- McKernan v. Bailey (16 L.D. 368); overruled, 17 L.D. 494.
- *McKittrick Oil Co. v. Southern Pacific R.R. Co. (37 L.D. 243); overruled so far as in conflict, 40 L.D. 528. (See 42 L.D. 317.)
- McMicken, Herbert, et al. (10 L.D. 97; 11 L.D. 96); distinguished, 58 I.D. 257, 260.
- McNamara et al. v. State of California (17 L.D. 296); overruled, 22 L.D. 666.
- McPeck v. Sullivan et al. (25 L.D. 281); overruled, 36 L.D. 26.
- *Mee v. Hughart et al. (23 L.D. 455); vacated, 28 L.D. 209. In effect reinstated, 44 L.D. 414, 487; 46 L.D. 434; 48 L.D. 195, 346, 348; 49 L.D. 660.
- *Meeboer v. Heirs of Schut (35 L.D. 335); overruled so far as in conflict, 41 L.D. 119. (See 43 L.D. 196.)
- Mercer v. Buford Townsite (35 L.D. 119); overruled, 35 L.D. 649.
- Meyer, Peter (6 L.D. 639); modified, 12 L.D. 436.
- Meyer v. Brown (15 L.D. 307). (See 39 L.D. 162, 225.)
- Midland Oilfields Co. (50 L.D. 620); overruled so far as in conflict, 54 I.D. 371.
- Miller, D. (60 I.D. 161); overruled in part, 62 I.D. 210.
- Miller, Edwin J. (35 L.D. 411); overruled, 43 L.D. 181.
- Miller v. Sebastian (19 L.D. 288); overruled, 26 L.D. 448.
- Milner and North Side R.R. Co. (36 L.D. 488); overruled, 40 L.D. 187.
- Milton et al. v. Lamb (22 L.D. 339); overruled, 25 L.D. 550.
- Milwaukee, Lake Shore and Western Ry. Co. (12 L.D. 79); overruled, 29 L.D. 112.

- Miner v. Mariott et al.* (2 L.D. 709) ; modified, 28 L.D. 224.
- Minnesota and Ontario Bridge Company* (30 L.D. 77) ; no longer followed, 50 L.D. 359.
- **Mitchell v. Brown* (3 L.D. 65) ; overruled, 41 L.D. 396. (See 43 L.D. 520.)
- Monitor Lode* (18 L.D. 358) ; overruled, 25 L.D. 495.
- Monster Lode* (35 L.D. 493) ; overruled so far as in conflict, 55 I.D. 348.
- Moore, Charles H.* (16 L.D. 204) ; overruled, 27 L.D. 482.
- Morgan v. Craig* (10 C.L.O. 234) ; overruled, 5 L.D. 303.
- Morgan v. Rowland* (37 L.D. 90) ; overruled, 37 L.D. 618.
- Moritz v. Hinz* (36 L.D. 450) ; vacated, 37 L.D. 382.
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- Moses, Zelmer R.* (36 L.D. 473) ; overruled, 44 L.D. 570.
- Mountain Chief Nos. 8 and 9. Lode Claims* (36 L.D. 100) ; overruled in part, 36 L.D. 551.
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- Muller, Ernest* (46 L.D. 243) ; overruled, 48 L.D. 163.
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- Mulnix, Philip, Heirs of* (33 L.D. 331) ; overruled, 43 L.D. 532.
- Nebraska, State of* (18 L.D. 124) ; overruled, 28 L.D. 358.
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- Neilsen v. Central Pacific R.R. Co. et al.* (26 L.D. 252) ; modified, 30 L.D. 216.
- Newbanks v. Thompson* (22 L.D. 490) ; overruled, 29 L.D. 108.
- Newton, Robert C.* (41 L.D. 421) ; overruled so far as in conflict, 43 L.D. 364.
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- New York Lode and Mill Site* (5 L.D. 513) ; overruled, 27 L.D. 373.
- **Nickel, John R.* (9 L.D. 388) ; overruled, 41 L.D. 129. (See 42 L.D. 313.)
- Northern Pacific R.R. Co.* (20 L.D. 191) ; modified, 22 L.D. 224 ; overruled so far as in conflict, 29 L.D. 550.
- Northern Pacific R.R. Co.* (21 L.D. 412 ; 23 L.D. 204 ; 25 L.D. 501) ; overruled, 53 I.D. 242. (See 26 L.D. 265 ; 33 L.D. 426 ; 44 L.D. 218 ; 177 U.S. 435.)
- Northern Pacific Ry. Co.* (48 L.D. 573) ; overruled so far as in conflict, 51 L.D. 196. (See 52 L.D. 58.)
- Northern Pacific R.R. Co. v. Bowman* (7 L.D. 238) ; modified, 18 L.D. 224.
- Northern Pacific R.R. Co. v. Burns* (6 L.D. 21) ; overruled, 20 L.D. 191.
- Northern Pacific R.R. Co. v. Loomis* (21 L.D. 395) ; overruled, 27 L.D. 464.
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- Northern Pacific R.R. Co. v. Miller* (7 L.D. 100) ; overruled so far as in conflict, 16 L.D. 229.
- Northern Pacific R.R. Co. v. Sherwood* (28 L.D. 126) ; overruled so far as in conflict, 29 L.D. 550.
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- Northern Pacific R.R. Co. v. Walters et al.* (13 L.D. 230) ; overruled so far as in conflict, 49 L.D. 391.
- Northern Pacific R.R. Co. v. Yantis* (8 L.D. 58) ; overruled, 12 L.D. 127.
- Nunez, Roman C. and Serapio* (56 I.D. 363) ; overruled so far as in conflict, 57 I.D. 213.
- Nyman v. St. Paul, Minneapolis, and Manitoba Ry. Co.* (5 L.D. 396) ; overruled, 6 L.D. 750.
- O'Donnell, Thomas J.* (28 L.D. 214) ; overruled, 35 L.D. 411.

- Olson v. Traver et al.* (26 L.D. 350, 628); overruled so far as in conflict, 29 L.D. 480; 30 L.D. 382.
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- Opinions of Solicitor, September 15, 1914, and February 2, 1915; overruled, September 9, 1919 (D-43035, May Caramony). (See 58 I.D. 149, 154-156.)
- Opinion of Solicitor, October 31, 1917 (D-40462); overruled so far as inconsistent, 58 I.D. 85, 92, 96.
- Opinion of Solicitor, February 7, 1919 (D-44083); overruled, November 4, 1921 (M-6397). (See 58 I.D. 158, 160.)
- Opinion of Solicitor, August 8, 1933 (M-27499); overruled so far as in conflict, 54 I.D. 402.
- Opinion of Solicitor, June 15, 1934 (54 I.D. 517); overruled in part, Feb. 11, 1957 (M-36410).
- Opinion of Solicitor, May 8, 1940 (57 I.D. 124); overruled in part, 58 I.D. 562, 567.
- Opinion of Acting Solicitor, June 6, 1941; overruled so far as inconsistent, 60 I.D. 333.
- Opinion of Acting Solicitor, July 30, 1942; overruled so far as in conflict, 58 I.D. 331. (See 59 I.D. 346, 350.)
- Opinion of Solicitor, August 31, 1943 (M-33183); distinguished 58 I.D. 726, 729.
- Opinion of Solicitor, May 2, 1944 (58 I.D. 680); distinguished, 64 I.D. 141.
- Opinion of Solicitor, March 28, 1949 (M-35093); overruled in part, 64 I.D. 70.
- Opinion of Solicitor, Jan. 19, 1956 (M-36378); overruled to extent inconsistent, 64 I.D. 58.
- Opinion of Solicitor, June 4, 1957 (M-36443); overruled in part, 65 I.D. 316.
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- Perry v. Central Pacific R.R. Co.* (39 L.D. 5); overruled so far as in conflict, 47 L.D. 304.
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- Phillips, Alonzo* (2 L.D. 321); overruled, 15 L.D. 424.
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- Pieper, Agnes C.* (35 L.D. 459); overruled, 43 L.D. 374.
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- Pietkiewicz et al. v. Richmond* (29 L.D. 195); overruled, 37 L.D. 145.
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- Pike's Peak Lode* (14 L.D. 47); overruled, 20 L.D. 204.

- Popple, James (12 L.D. 433); overruled, 13 L.D. 588.
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- Rankin, James D., et al. (7 L.D. 411); overruled, 35 L.D. 32.
- Rankin, John M. (20 L.D. 272); reversed, 21 L.D. 404.
- Rebel Lode (12 L.D. 683); overruled, 20 L.D. 204; 48 L.D. 523.
- *Reed v. Buffington (7 L.D. 154); overruled, 8 L.D. 110. (See 9 L.D. 360.)
- Regione v. Rosseler (40 L.D. 93); vacated, 40 L.D. 420.
- Reid, Bettie H., Lucille H. Pipkin (61 I.D. 1); overruled, 61 I.D. 355.
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- Rio Verde Canal Co. (26 L.D. 381); vacated, 27 L.D. 421.
- Roberts v. Oregon Central Military Road Co. (19 L.D. 591); overruled, 31 L.D. 174.
- Robinson, Stella G. (12 L.D. 443); overruled, 13 L.D. 1.
- Rogers, Fred B. (47 L.D. 325); vacated, 53 I.D. 649.
- Rogers, Horace B. (10 L.D. 29); overruled, 14 L.D. 321.
- Rogers v. Atlantic & Pacific R.R. Co. (6 L.D. 565); overruled so far as in conflict, 8 L.D. 165.
- *Rogers v. Lukens (6 L.D. 111); overruled, 8 L.D. 110. (See 9 L.D. 360.)
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- *St. Paul, Minneapolis and Manitoba Ry. Co. (8 L.D. 255); modified, 13 L.D. 354. (See 32 L.D. 21.)
- St. Paul, Minneapolis and Manitoba Ry. Co. v. Hagen (20 L.D. 249); overruled, 25 L.D. 86.
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- Salsberry, Carroll (17 L.D. 170); overruled, 39 L.D. 93.
- Sangre de Cristo and Maxwell Land Grants (46 L.D. 301); modified, 48 L.D. 88.
- Sante Fe Pacific R.R. Co. v. Peterson (39 L.D. 442); overruled, 41 L.D. 383.
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- *Sayles, Henry P. (2 L.D. 88); modified, 6 L.D. 797. (See 37 L.D. 330.)
- Schweitzer v. Hilliard et al. (19 L.D. 294); overruled so far as in conflict, 26 L.D. 639.
- Serrano v. Southern Pacific R.R. Co. (6 C.L.O. 93); overruled, 1 L.D. 380.
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- Shineberger, Joseph (8 L.D. 231) ; over-ruled, 9 L.D. 202.
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- Simpson, Lawrence W. (35 L.D. 399, 609) ; modified, 36 L.D. 205.
- Sipchen *v.* Ross (1 L.D. 634) ; modified, 4 L.D. 152.
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- Snook, Noah A., et al. (41 L.D. 428) ; overruled so far as in conflict, 43 L.D. 364.
- Sorli *v.* Berg (40 L.D. 259) ; overruled, 42 L.D. 557.
- Southern Pacific R.R. Co. (15 L.D. 460) ; reversed, 18 L.D. 275.
- Southern Pacific R.R. Co. (28 L.D. 281) ; recalled, 32 L.D. 51.
- Southern Pacific R.R. Co. (33 L.D. 89) ; recalled, 33 L.D. 528.
- Southern Pacific R.R. Co. *v.* Bruns (31 L.D. 272) ; vacated, 37 L.D. 243.
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- State of California (44 L.D. 118) ; overruled, 48 L.D. 98.
- State of California (44 L.D. 468) ; overruled, 48 L.D. 98.
- State of California *v.* Moccettini (19 L.D. 359) ; overruled, 31 L.D. 335.
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- State of California *v.* Smith (5 L.D. 543) ; overruled so far as in conflict, 18 L.D. 343.
- State of Colorado (7 L.D. 490) ; overruled, 9 L.D. 408.
- State of Florida (17 L.D. 355) ; reversed, 19 L.D. 76.
- State of Florida (47 L.D. 92, 93) ; overruled so far as in conflict, 51 L.D. 291.
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- State of Louisiana (24 L.D. 231) ; vacated, 26 L.D. 5.
- State of Louisiana (47 L.D. 366) ; overruled so far as in conflict, 51 L.D. 291.
- State of Louisiana (48 L.D. 201) ; overruled so far as in conflict, 51 L.D. 291.
- State of Nebraska (18 L.D. 124) ; overruled, 28 L.D. 358.
- State of Nebraska *v.* Dorrington (2 C.L.L. 467) ; overruled so far as in conflict, 26 L.D. 123.
- State of New Mexico (46 L.D. 217) ; overruled, 48 L.D. 98.
- State of New Mexico (49 L.D. 314) ; overruled, 54 I.D. 159.
- State of Utah (45 L.D. 551) ; overruled, 48 L.D. 98.
- *Stevenson, Heirs of *v.* Cunningham (32 L.D. 650) ; overruled so far as in conflict, 41 L.D. 119. (See 43 L.D. 196.)
- Stewart et al. *v.* Rees et al. (21 L.D. 446) ; overruled so far as in conflict, 29 L.D. 401.
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- Stricker, Lizzie (15 L.D. 74) ; overruled so far as in conflict, 18 L.D. 283.

- Stump, Alfred M. et al. (39 L.D. 437); vacated, 42 L.D. 566.
- Sumner v. Roberts (23 L.D. 201); overruled so far as in conflict, 41 L.D. 173.
- Sweeney v. Northern Pacific R.R. Co. (20 L.D. 394); overruled, 28 L.D. 174.
- *Sweet, Eri P. (2 C.L.O. 18); overruled, 41 L.D. 129. (See 42 L.D. 313.)
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- Taggart, William M. (41 L.D. 282); overruled, 47 L.D. 370.
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- Walker v. Southern Pacific R.R. Co. (24 L.D. 172); overruled, 28 L.D. 174.

- Walters, David (15 L.D. 136) ; revoked, 24 L.D. 58.
- Warren *v.* Northern Pacific R.R. Co. (22 L.D. 568) ; overruled so far as in conflict, 49 L.D. 391.
- Wasmund *v.* Northern Pacific R.R. Co. (23 L.D. 445) ; vacated, 29 L.D. 224.
- Wass *v.* Milward (5 L.D. 349) ; no longer followed. (See 44 L.D. 72 and unreported case of Ebersold *v.* Dickson, September 25, 1918, D-36502.)
- Waterhouse, William W. (9 L.D. 131) ; overruled, 18 L.D. 586.
- Watson, Thomas E. (4 L.D. 169) ; recalled, 6 L.D. 71.
- Weathers, Allen E., Frank N. Hartley (A-25128), May 27, 1949, unreported ; overruled in part, 62 I.D. 62.
- Weaver, Francis D. (53 I.D. 179) ; overruled so far as in conflict, 55 I.D. 290.
- Weber, Peter (7 L.D. 476) ; overruled, 9 L.D. 150.
- Weisenborn, Ernest (42 L.D. 533) ; overruled, 43 L.D. 395.
- Werden *v.* Schlecht (20 L.D. 523) ; overruled so far as in conflict, 24 L.D. 45.
- Western Pacific Ry. Co. (40 L.D. 411 ; 41 L.D. 599) ; overruled, 43 L.D. 410.
- Wheaton *v.* Wallace (24 L.D. 100) ; modified, 34 L.D. 383.
- White, Anderson (Probate 13570-35) ; overruled, 58 I.D. 149, 157.
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NOTE.—The abbreviations used in this title refer to the following publications : "B.L.P." to Brainard's Legal Precedents in Land and Mining Cases, vols. 1 and 2 ; "C.L.L." to Copp's Public Land Laws, edition of 1875, 1 volume ; edition of 1882, 2 volumes ; edition of 1890, 2 volumes ; "C.L.O." to Copp's Land Owner, vols. 1-18 ; "L. and R." to records of the former Division of Lands and Railroads ; "L.D." to the Land Decisions of the Department of the Interior, vols. 1-52 ; "I.D." to Decisions of the Department of the Interior, beginning with vol. 53.—**EDITOR.**

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APPEAL OF MERRITT-CHAPMAN & SCOTT CORPORATION

IBCA-240

Decided January 4, 1961

Contracts: Payments—Labor: Wage Rates—Rules of Practice: Evidence

Where the contracting officer's findings are based on a presumption that subsistence payments are included in increased wage rates and are therefore not eligible for escalation payments, because previous union labor agreements with the contractor contained subsistence provisions which were absent from the new union labor agreements providing for increased wage rates, such presumption is founded on circumstantial evidence and is rebutted by the contractor's evidence that subsistence requirements had ceased as to his employees who had been provided with housing and other facilities and who had become residents at the job site, and further evidence that the increased wage rates were essential to settlement of a prolonged strike and for attracting a sufficient labor supply to the job site in a desert area.

BOARD OF CONTRACT APPEALS

Merritt-Chapman & Scott Corporation, a Delaware corporation, has appealed timely on May 16, 1960, from the Findings of Fact and Decision made by the contracting officer, dated April 21, 1960. This dispute arises out of the application of contract provisions for escalation of wages, and the appellant's claims involve a potential in excess of \$3,000,000. A hearing of this appeal was held in Washington, D.C., August 22 through 25, 1960.

This contract was executed April 29, 1957, after formally advertised bidding, and provides for the erection of Glen Canyon Dam, in the extreme northern area of Arizona, 130 miles from the nearest town, Flagstaff, and 300 miles from Phoenix, on the upper reaches of the Colorado River. The new city of Page was established at this job-site. Also provided by the contract is the construction of the accompanying power house, appurtenant works, access highways and service roads, all under the Schedule of Specifications No. DC-4825. The contract was executed on Form 23 (Revised March 1953), and contained Form 23A (March 1953), with certain minor modifications of no import in this appeal.

The bid price of the contract was \$107,995,522.00, and the life of the agreement extends well into the year 1964. Therefore, the contract scope, its value and its duration are of unusual magnitude. These factors are highly significant here, because of the obvious, inherent risks involved for both parties. That significance is heightened by the considered measures taken by the Government by means of wage escalation provisions, and offered to all bidders, for equalizing and sharing the hazards of increases in wages of labor, one of the most unpredictable of all risks for the contractor in projects of such long duration. This sharing of risks was also of considerable benefit to the Government, to the extent that it was calculated to eliminate, or did eliminate, in large measure, those elements of the bidders' estimates of cost which would otherwise be included in bids as contingencies, or protection against possible (and very likely) increases in labor costs.

Briefly, these wage escalation clauses provided for adjustment of hourly wages "actually paid" by appellant after May 31, 1959, as opposed to the prevailing hourly base rates set forth in the specifications. Under this arrangement, the Government would pay 85% of such increases,¹ excluding payments "* * * in the form of * * * subsistence payments * * *."

The text of these provisions, in Paragraph 19 of the contract Specifications, is set forth below:

Adjustment for changes in cost. All monthly estimates for payments as provided for in Clause No. 7 of the General provisions, made for work performed during the first full weekly pay period after May 31, 1959, and thereafter, will be subjected to adjustment to compensate for change either upward or downward in the amount of wages paid to laborers and mechanics.

The amounts due under the contract will be adjusted by the amount of eighty-five percent (85%) of the difference between the total amount of wages actually paid to laborers and mechanics employed under the contract or any construction subcontract, and the total amount of wages that would have been paid if computed at hourly base rates determined as follows: For any classification of laborer or mechanic, the rate per hour to be used as a base for determination of the adjustment will be determined from the following sources in the order given: (1) from the rate per hour stated in Paragraph 16; if the rate cannot be so established, then (2) from the highest rate per hour for the classification as stated in any agreements in effect in the area and existing between labor unions or groups and contractors on the date of the contract; or (3) if hourly

¹ At the hearing, appellant's witness, Mr. Helmer testified that the remaining actual cost borne by appellant in such adjustments would be about 40% rather than 15%, after adding costs of corresponding salary increases which must be given to supervisory and office personnel (not subject to escalation) and indirect increased expense of payroll taxes, workmen's compensation, social security, and employment security.

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rates cannot be established from any of the above sources, then the average of the hourly rate paid for the first 6 months for the labor classification for work under this contract will be the basic hourly rate.

In computing the adjustment in compensation to be made under this paragraph, illegal working time of laborers and mechanics; *payments in the form of bonuses, incentive payments, or gratuities, subsistence payments, and travel allowances*; and all costs of compensation insurance and other direct or indirect charges, contributions, or taxes, either State or Federal, applying to payrolls will not be considered. (Emphasis supplied.)

At the time of entering into this contract, there were two general classes of construction workers in Arizona, as distinguished by certain differences in their respective statewide agreements with the appropriate segments of the Arizona construction industry. One class consisted of the "Electricians" (International Brotherhood of Electrical Workers), which had executed a statewide agreement with industry (National Electrical Contractor's Association, Arizona Chapter) for the years 1956-1957, expiring May 31, 1957. The other group, known as the "Five Basic Crafts," composed of unions representing carpenters, teamsters, operating engineers, cement masons, and laborers, had, as a group, executed a statewide Master Labor Agreement with the Associated General Contractors, Arizona Chapter, effective from June 1, 1955 to May 31, 1959. The facts as to these two groups differ in certain essentials, and will be discussed separately.

The 1955-1956 statewide labor agreement of the Electricians, and the successor agreement which expired May 31, 1958, provided for free board and lodging or \$7.00 per day subsistence for employees working beyond certain commuting distances of a free zone (a city where the union maintained a dispatching office). The \$7.00 per day subsistence was payable 7 days per week, unless the employer elected to pay for travel over the weekend, to and from the dispatching point. These allowances were applicable to the Glen Canyon project at Page, Arizona.

The next agreement of the Electricians, for the period June 20, 1958 to June 20, 1959, eliminated provisions for free board and room and per diem subsistence, and set up concentric wage-rate zones surrounding each city where the union maintained an office. Zone A (within 16 miles) paid \$3.80 per hour; Zone B (16 to 32 miles) paid \$4.175; Zone C (32 to 48 miles) paid \$4.55; Zone D (more than 48 miles) paid \$4.90 per hour.

The appellant, (actually its electrical subcontractor, Morgan Electric Company, but with no effect on the issues) paid the wages called for by the applicable statewide Electricians agreement, including the

\$4.90 per hour for Zone D which was applicable to the City of Page and to the Glen Canyon Project. The \$4.90 rate amounted to an increase in wages of \$1.45 per hour over the 1957-1958 rate of \$3.45 per hour, but after June 20, 1958 no subsistence was paid or payable. Also, the Zone D rate was \$1.10 per hour higher than the "free" Zone A or base rate of \$3.80 per hour. Neither the appellant nor its subcontractor had any part in negotiating any of the labor agreements with the Electricians' Union just described, but both were required to honor such agreements because of the obligations of the subcontractor, Morgan Electric Company, a member of the National Electrical Contractors' Association.

On May 15, 1959, anticipating the June 1, 1959, date for commencement of operation of the wage escalation clause, the Government notified the appellant that, for the purpose of escalation, the rate of \$4.90 per hour would not be used as it contained a component of \$1.10 per hour in lieu of subsistence, which was excluded from escalation, and that this amount would be deducted from the gross wages before computing the adjustment. The appellant protested vigorously in its letter of May 25, 1959, pointing out that the \$4.90 rate had been treated as wages for nearly a year, and for several official Government purposes, including Social Security, Income Tax withholding, Workmen's Compensation, and minimum wage rates for contracts bid after June 20, 1958. Nevertheless, the Government reaffirmed its position in its letter of June 29, 1959.

The Five Basic Crafts, in their statewide 1955-1959 agreement with the Associated General Contractors, Arizona Chapter (hereinafter referred to as the AGC) were entitled to free board and room for working on "Remote Projects," or, in the alternative, \$6.00 per diem for subsistence. "Remote Projects" were individually designated by a committee under Article XIV of the agreement, quoted as follows:

A. It is mutually recognized that remote projects frequently involve special living accommodation problems. A special committee shall be appointed composed of three (3) Contractor representatives and three (3) representatives of the Unions, together with an ex-officio representative of both parties, which committee shall investigate and make decision binding on the parties with reference to establishment of construction projects as remote.

B. When a project is established as remote, as provided in the preceding paragraph, Contractors shall have the option of providing a camp at the job site or providing adequate free transportation for employees from the nearest town where suitable living accommodations are available. If a camp is provided, the Contractor shall not charge employees for board and room facilities. Where the Contractor elects to provide transportation, any travel time shall be paid for at the regular straight time rate of the employee as a travel time allowance.

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C. Appeal from decisions of this committee may be made to the Joint Conference Board in the same manner as provided for appeals from Area Joint Labor-Management Committees under provisions of Article V of the Agreement. Remote Project Committee members shall be appointed within fifteen (15) days after this Agreement has been signed.

Pursuant to this provision, the Remote Projects Committee had, on December 12, 1956, designated the Glen Canyon Project as remote, to remain in that status until 30 days after the same committee should find that residential housing facilities in the immediate area were available to those employees who desired them. Upon a finding that the remote status had ceased to exist, the successful bidder would no longer be required to furnish free board and room or subsistence at \$6.00 per day in lieu thereof.²

At a meeting of prospective bidders on December 18, 1956, at Phoenix, Arizona, all such bidders, including appellant, were informed of this and other factors of the labor agreements. Although appellant had expected to honor the statewide Master Labor Agreements with the Five Basic Crafts by virtue of its existing agreements with the national bodies of the unions (except for the Teamster's Union, which does not enter into national agreements), in discussing the arrangements for labor supply with the local Arizona unions, the latter insisted upon actual signature by appellant of the Master Labor Agreements as a condition precedent to the supply of labor by the unions. In many areas of the country, the local unions do not require such signature where the contractor moving into the area has executed agreements with the National Unions, agreeing to comply with the wage rates and working rules in the agreements between the local unions and a recognized industry group of contractors.

Following the award of the Glen Canyon contract to appellant, the latter proceeded to erect bunkhouses, a cafeteria, trailers and residences, and other facilities. It was obliged to do so by the terms of the contract. During this time the Government expanded its facilities, municipal buildings, and housing for Government employees, and several commercial concerns established their services and facilities at the new city of Page, Arizona.

² The resolution of the committee reads as follows: "The Glen Canyon Project shall be remote until thirty (30) days after the contractor has notified the Remote Projects Committee and the Committee finds that residential housing facilities are available for those employees who wish to avail themselves of these facilities." The arbitrator went beyond these requirements and adopted a concept involving such facilities as a hospital, churches and schools, places of entertainment, etc., to provide a more or less complete community.

In late 1957, appellant applied to the Remote Projects Committee to declare the project no longer remote. The committee was equally divided in its vote, and on appeal by the appellant, the State Joint Conference Board vote resulted in a tie. An arbitrator was selected, and on May 20, 1958, his decision was issued, to the effect that the appellant had not made residential housing facilities available as contemplated by the resolution of the Remote Projects Committee.

Appellant thereafter made such additional facilities available as were intended to cure the deficiencies found by the arbitrator, including a 25-bed hospital, and after consulting with the unions, and again petitioned the Remote Projects Committee for removal of the remote status. The same procedural steps were taken, resulting in tie votes by the Committee and by the State Joint Conference Board, and arbitration was again resorted to. On January 15, 1959, the arbitrator ruled that as of that date the contemplated residential facilities had been made available by appellant as required.

The appellant then advised its employees that free board and room would cease on January 25, 1959. On January 22, 1959, the members of the Five Basic Crafts walked out in an unauthorized strike, but started returning to work on February 2, 1959. Many of the skilled workers, however, never did come back to work, and over the next four months other workers in scarce supply gradually drifted away from the project.

Nevertheless, the work went on and no further subsistence or free board and room was paid or furnished by appellant.

During this period, and as early as October 1958, the AGC was negotiating with the Five Basic Crafts for a contract to take the place of the 1955-1959 agreement which would expire on May 31, 1959. Appellant was invited to participate with the AGC (of which it was not a member) but it declined for the stated reasons that it was too early at that time, and that their respective interests were no longer similar, especially after removal of the remote status of Page as to appellant. Never having found it practicable to furnish any facilities of their own at Page, the AGC members who had various comparatively modest contracts of short duration, for construction of buildings at Page, were still obligated to pay subsistence to their employees who were not Page residents; for as far as the AGC contractors were concerned Page was still a remote area at that time.

In any event, the new Master Labor Agreement as finally executed in May 1959 between the AGC and the Five Basic Crafts (except for the Operating Engineers) did not contain any provisions excluding

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the Glen Canyon area from its coverage, but the Remote Projects clause was dropped. New provisions took its place, establishing 12 cities in Arizona as basing points, with zones surrounding them for determination of varying expense allowances payable at increasing rates of \$2.00, \$4.00, and \$6.00 per day for Zones 2, 3 and 4, respectively. Zone 1 included the base city, in this case Flagstaff, so that Glen Canyon, being 130 miles distant, was in Zone 4, requiring payment of the \$6.00 maximum expense allowance. This was the same allowance established by the predecessor agreement for remote projects. Wages were increased by \$0.18 per hour effective June 1, 1959, with further increments of \$0.20 per hour effective June 1, 1960 and June 1, 1961. Appellant had not participated in the negotiations in any way, and did not sign this agreement, although it had been advised by AGC at intervals as to progress of the negotiations.

As no agreement had been reached between AGC and the Operating Engineers on June 1, 1959, these workers struck all construction jobs in Arizona, except the Glen Canyon Project, in early June 1959. Work was resumed on the other jobs after a new agreement was executed July 28, 1959, effective June 1, 1959. As in the case of the other crafts, appellant did not participate in the negotiations and did not sign the new agreement.

Although appellant had been negotiating separately with the Five Basic Crafts in May 1959, no agreement had been reached on June 1, 1959. The appellant announced that it would pay the wage rates established by the new master labor agreement and would accept all other provisions in it except for the expense or subsistence allowance; and that it would continue to negotiate with the unions for a separate project agreement by June 17, 1959, or some other mutually acceptable date.

Work continued on the Glen Canyon Project at a reduced rate throughout June 1959, but no agreement having been reached, and no subsistence or expense allowance having been paid, the project was picketed on July 6, 1959. The union announcement, in connection with the picketing, stated, *inter alia*, that " * * * Merritt-Chapman & Scott has been and is now in violation of its collective bargaining agreements * * *".

This charge against appellant arose out of the alleged obligation of appellant, under its National Agreements, to abide by the provisions of local collective bargaining agreements. Appellant denied that any such obligation existed as to the new Master Labor Agree-

ment between the AGC and the Crafts. The issue was taken before the Arizona Employment Security Commission, as one of the matters involved in the claims of the unions for unemployment compensation, for those union members who were unemployed because of the work stoppage at the Glen Canyon project. Eligibility for such compensation depended upon whether the work stoppage was a lockout by appellant or a strike by the unions. On December 11, 1959, the Commission affirmed a decision dated September 26, 1959 by its Special Deputy, holding that the work stoppage constituted a strike, and that appellant was not bound, by the terms of its National Agreements, to observe the new statewide Master Labor Agreements.

The strike began July 6, 1959, and continued until January 4, 1960, after a Project Agreement had been executed by the appellant with the Five Basic Crafts on December 22, 1959, granting wage increases of \$0.50 per hour in excess of the statewide agreement, but with no subsistence. During the strike period, the City of Page became a virtual "ghost-town" and considerable hardship and severe losses were suffered by the strikers and the commercial interests located there. Many of the strikers moved away. Appellant claims, without denial by the Government, that the strike cost it, appellant, more than \$3,000,000.00. Serious losses were also sustained by the Government because of the delay in the progress of work on the project.

In addition to the many negotiation meetings (25) between appellant and the unions, several meetings took place between representatives of the Government and the appellant, in efforts to find a mutually acceptable solution of the strike dispute. Unfortunately, these attempts did not bear fruit, for reasons involving principally the difficulty of reaching an understanding as to sharing the cost of any strike settlement, and the effect of such cost sharing on the wage escalation provisions.

If the unions had originally intended, in May or June 1959, to press for payment of subsistence pursuant to or similar to such allowances in the new Master Labor Agreement, this position changed, at an early stage, to demands for increased wages. At first, the unions insisted on a wage increase of \$0.75 per hour in excess of the wage rates established by the new statewide agreement with AGC.

At a meeting with the Contracting Officer on July 14, 1959, appellant asked if Government would escalate wages paid in excess of those provided by the Arizona Master Labor Agreement, without any subsistence pay provisions, if agreement was reached with the unions on such a basis. The Contracting Officer stated that he would not render a decision on this point, in advance of the submission to him of a firm agreement between appellant and the unions.

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Appellant had expended about \$2,500,000.00 in establishing dormitories, cafeterias, residential housing, trailers, a trailer park, a hospital, paved streets, utilities, etc. Aside from having received a decision from the arbitrator removing the remote status of Page, Arizona as to appellant's contract, the appellant considered that, with Government and mercantile contributions, schools, playgrounds, etc., the city now constituted a self-sufficient municipality as well as a fairly good place to live, within the limitations imposed by a lack of certain cultural and recreational amenities, and by the windy, barren desert wastes typical of that section of the state. Many of its employees who had families had moved to Page and had established residence there. Housing was available to all who wished it, at reasonable rentals. Costs of food, clothing and other commodities were comparable to prices in Flagstaff, according to the last arbitration concerning remote status. Several Flagstaff stores have branches in Page.

On principle, therefore, appellant considered that there was no longer any subsistence issue as such, for the residents of Page were now in a status similar to that of residents who live in Flagstaff, for example, or in one or the other of 12 union basing points in Arizona. True, there were some disadvantages, as pointed out by the union leaders. The unions had never completely accepted the arbitration decision. They did, however, refrain from calling a strike under the previous statewide agreement, after the arbitration decision and cessation of free board and room, and subsistence payments, on February 1, 1959. Benefits and advantages, once secured, are seldom surrendered without a vigorous fight. In this case, the benefits involved substantial monetary values to the workers, and had been received over a considerable period.

Moreover, the Board concludes from the evidence, that during the several months preceding February 1, 1959, the required residential housing and other facilities were substantially complete, and were in use. Therefore, the subsistence benefits necessarily became, insofar as the workers were concerned, less and less the originally contemplated reimbursement for actual extra living costs of working away from home. Accordingly, such benefits ever increasingly took on the aspects of extra remuneration related to, if anything, working conditions at Glen Canyon, and the matter of living in a desolate tree-less region, considerably out of touch with other more comfortable and more aesthetically satisfactory communities. Although detailed reasons will be mentioned later, this could be said to be the origin of the unions' rationale, underlying their demands for wage increases as a *quid pro quo* for the loss of valuable benefits.

Among the other reasons or arguments advanced by the unions in support of a wage variance or increase over the wage rates established in the new statewide agreement were the following:

1. The unions considered that they were entitled to a wage increase, and could get it if they held out long enough. As a practical matter, it was probably true that the unions could afford to wait. The union officers were located in Phoenix, 300 miles from Glen Canyon. It was not feasible for the rank and file remaining at Glen Canyon to put any pressure on these officers for settlement of the strike. The leaders held no meetings of union members. Any striker who was a member of a local union, and who came to the office and asked for a job was given one, either on private construction at Page, or elsewhere, for most localities in Arizona were enjoying a construction boom. As an indication of the opinion of the unions concerning the strength of their own bargaining position, none of the 25 negotiation meetings were sought by the unions. They were all requested by appellant. Some assistance in arranging these meetings was given by the Governor of Arizona. About 10 meetings were attended by a Federal Mediation Conciliation Service representative.

2. Even though Page had been removed from a remote status as to appellant, a wage variation was necessary in order to attract a sufficient number of skilled workers. This was apparently, if regrettably, true. After subsistence had been stopped on February 1, 1959, workers having scarce skills began to leave Glen Canyon, and there was a general exodus of workers who had not brought families. There was a need for about 2,000 workers, of whom 1,200 to 1,500 were in the Five Basic Crafts. A comparatively low number of men were working by June 1959.

3. Although most of the necessities of life existed at Page, some of the luxuries considered to be semi-necessities were lacking, such as movies, fishing, boating, music and music lessons.

4. In case of temporary layoffs, there were no opportunities in Page for fill-in work. It was not worthwhile for a Page resident to seek work in Flagstaff for 3 or 4 days as a worker resident in such cities could do. Therefore, such temporary (and any permanent) layoffs were a serious loss to Page residents and caused some hardships not common to most communities.

5. The hazardous nature of dam work was presented by union leaders who emphasized the dangers of working in a canyon having sheer walls of about 700 feet in height. While the hazards for most workers were not great enough to justify hazardous pay as such, working on house construction or commercial buildings in Phoenix would be considered more attractive to most workers from a safety

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standpoint, the pay for both jobs being equal. At the time of the hearing on August 22, 1960, there had been 9 deaths from accidents on the job (not all employees of appellant) and about 3,000 accidents, despite an extensive safety program.

6. The \$10,000,000 worth of equipment at the job, owned by appellant or its subcontractors, some of it possibly hazardous to operate, involved a responsibility on the part of the workers which justified a differential.

The new Project Agreement, executed December 22, 1959, between the appellant and the Five Basic Crafts, contained wage increases of \$0.50 above the rates established by the statewide agreement effective June 1, 1959 between the AGC or "industry" and these unions, and eliminated all subsistence benefits "in any form."³ In addition, there were the following differences, or special provisions in the Project Agreement of December 22, 1959, not found in the unions' 1959 agreement with AGC:

1. The agreements are not co-terminous. The AGC agreement is for 2 years while the Project Agreement is for 5 years with right of reopening at the end of 2½ years as to wages and fringe benefits.

2. The grievance procedure in the Project Agreement permits appellant and the unions to handle their own grievances, instead of settling them by committees composed of other employers as in the AGC agreement.

* "ARTICLE XIII—Facilities and Cost

A. Inasmuch as the Contractor has provided residential housing and other facilities at the project for its employees such as, but not limited to, dormitories capable of lodging 936 men, cafeterias, seven one-bedroom apartments, 72 two-bedroom apartments, 14 three-bedroom apartments, 21 rental house trailers, a trailer park containing 794 spaces with paved streets having electrical, water and sewer facilities, and a 25-bed accredited hospital fully staffed, and agrees that it will continue to provide such facilities during the term hereof at the following rates, it will not be required to pay subsistence in any form, or reimburse the employees covered by this Agreement for any expense incurred as a result of their employment on the construction project (except as provided in Article XV, rule number 20).

B. Rates:

Cafeteria:

\$21.50—Five (5) minimum days per week @ \$4.30 per day.

Lodging:

\$7.00 per week.

Apartment Units:

\$75.00 per month, payable in advance, for 1 bedroom unit.

\$80.00 per month, payable in advance, for 2 bedroom unit.

\$100.00 per month, payable in advance, for 3 bedroom unit.

The above rates cover all utilities, including water, electricity, sewage and garbage disposal. Electric range and/or refrigerator are optional and may be rented at \$5.00 per month each.

Company Trailers: (Rental or Rental-Purchase)

\$60.00 per month by payroll deduction.

\$25.00 deposit required prior to moving into trailer.

Trailer Space:

\$40.00 per month paid in advance to the Page Trailer Court.

The above rate includes electricity, water, sewage and garbage disposal."

3. The Project Agreement contains a provision requiring appellant to maintain the housing and other facilities for the workers for the life of the contract at stated reasonable rates, in lieu of subsistence.

4. The Project Agreement sets up a new safety program administered by a committee composed of local union membership and local management under the direction of a safety engineer appointed by appellant for that exclusive purpose, and assisted by the safety engineering department of the Bureau of Reclamation, instead of by a committee composed of individuals appointed by the construction industry in Phoenix.

5. The work covered by the Project Agreement is entirely different from the types of work conducted by industry in Page or in other parts of Arizona.

6. The effective date of the Project Agreement for payment of the increased wages of \$0.50 per hour was July 15, 1959, instead of the usual practice of making it retroactive to June 1, 1959, when the previous AGC agreement had expired. This meant that from June 1, 1959, to the date of the strike on July 6, 1959, when the Five Basic Crafts were working without a contract, no increase was paid over the statewide industry or AGC rates. The strike of the Operating Engineers was settled by AGC on July 28, 1959, with its wage increases and effective contract date retroactive to June 1, 1959.

Following the submission by appellant to the Government, on December 23, 1959, of the Project Agreement dated December 22, 1959, appellant requested that the Government compute the adjustment for changes in labor rates on the basis of the new rates in the Project Agreement, including the \$0.50 per hour increase.

Prior to issuing the Findings of Fact and Decision of the contracting officer on April 21, 1960, the Administrative Assistant Secretary of the Interior Department, by letter of February 16, 1960, submitted to the Comptroller General of the United States, for advance decision, the question of legality of the contractor-appellant's two claims for escalation of the wage rates involved in the increased wages paid to the Electricians and to the Five Basic Crafts. Also submitted was a copy of a memorandum dated February 2, 1960, from the Acting Assistant Commissioner and Chief Engineer, Bureau of Reclamation, setting forth the factual background of the claims. The appellant did not submit any arguments or evidence in this *ex parte* proceeding, nor was it invited to do so.

In a letter opinion (B-142040) dated April 1, 1960, to the Secretary of the Interior, the Comptroller General reviewed the facts and views as submitted by the Department and came to certain conclusions which are quoted below:

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On the basis of the provisions of Paragraph 19 of the specifications, we concur in the view of the Acting Assistant Commissioner and Chief Engineer that the Government is not liable as a matter of law for escalation on the full amounts of the increases in the nominal wage rates, if in fact the increased rates include elements of subsistence or travel pay or other items excluded from consideration by the third sub-paragraph of that article.

We believe, however, that the amount of such excluded components included in the increased rate is a question primarily of fact, to be determined in the first instance by the Contracting Officer, and subject to appeal and final resolution under the provisions of the Disputes clause of the contract. In view of the full consideration already given to the question, as indicated by the report of the Acting Assistant Commissioner, it would appear necessary only to state his determinations as findings of fact and furnish a copy thereof to the contractor.

Apparently, the material submitted to the Comptroller General included a preliminary draft of the contracting officer's proposed Findings of Fact and Decision. The Contracting Officer in this case was the Acting Assistant Commissioner and Chief Engineer.

Having set forth in the preceding pages a greatly condensed account of the complicated historical background of this appeal, we pass now to an examination of the issues.

The basic issue can be simply stated, in two parts. (1) Are the payments of increased wages of \$1.10 and \$0.50 per hour made by appellant to its employees pursuant to the 1958-1959 Electricians Agreement, and pursuant to the Project Agreement dated December 22, 1959, with the Five Basic Crafts, respectively, for work performed during the first full weekly pay period after May 31, 1959, and thereafter, "wages actually paid," within the meaning of Paragraph 19 of the Specifications No. DC-4825; and (2) are any portions of such payments "in the form of bonuses, incentive payments, or gratuities, subsistence payments, and travel allowances" within the meaning of the same Paragraph 19?

Department Counsel have urged the consideration of an additional issue, namely:

Whether, upon expiration of the 1955 Master Agreement, MCS [appellant] under the terms of the National Agreements with four of the five basic crafts become obligated to pay the wages and observe the working conditions contained in the 1959 Master Agreements with the result that MCS was required to pay subsistence as provided for in the 1959 Master Agreements.

The appellant refused to stipulate or to acknowledge this question as being in issue, since it was not the subject of a finding by the contracting officer; and for the further reason that it is in the nature of *res adjudicata*, by reason of the decision of the Arizona Employment Security Commission, holding that the National Agreements were not binding on appellant under the circumstances, as described *supra*.

We are inclined to agree with appellant's arguments. The Contracting Officer's Findings of Fact and Decision of April 21, 1960, in paragraph 33 thereof, touched briefly on this matter but concluded that " * * * I do not deem it necessary to pass on the legal question involved, since under the factual determination reached hereinafter, even if it were conceded that Merritt-Chapman & Scott was a free agent and was not bound by the National and International Agreements, the claim presented is one involving payment of subsistence * * * ." There being no definite finding by the Contracting Officer on this question, it cannot be considered on this appeal. This Board has ruled consistently on this point in several cases, holding that it has no jurisdiction in the absence of such findings.⁴ Assuming, however, that it could be viewed as purely legal reasoning or argument of Department Counsel, there has been decided, as stated *supra*, in a forum of unchallenged jurisdiction, precisely the same dispute, between the parties who had the original right to litigate this question. Under these circumstances, the doctrine of *re adjudicata* must prevail. This has long been the rule in the United States Supreme Court in cases involving decisions of administrative agencies.⁵

Apart from the defenses to these technical contentions by the Government, the reasonableness of the Government's theory is open to serious doubt. This query is posed: Considering the various agreements between the appellant and the national and local unions, can it be seriously urged that appellant and the local unions were not free on December 22, 1959, to adopt a new, local, project agreement—a type of labor contract which apparently might have been adopted when the appellant first came into Arizona? In 1957, the union leaders made it clear to appellant that a separate project agreement would not be acceptable to them, not because the unions considered that such a separate agreement would be in violation of their relations with their national bodies, but for the reason that they preferred to have the appellant sign the existing agreements with the Arizona AGC. The unions did not at any time use or rely on the national agreements.

Also, any separate agreement entered into with another contractor, not bound by the Arizona statewide agreement, carried with it the risk of being subjected to the effects of the so-called "Favored Nations" clause of the latter agreement. The substance of this clause was that if the unions should later enter into a separate agreement with any contractor, which agreement was more favorable to the separate contractor than the statewide AGC agreement, the AGC contractors would be entitled to the more favorable terms accorded by the unions to the contractor who had separately received them. These

⁴ *General Excavating Co.*, IBCA-150 (May 25, 1959), 59-1 BCA par. 2190.

⁵ *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430-8 (1943).

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provisions had to be taken into account by the union in evaluation of their rights and those of appellant, under the Project Agreement of December 22, 1959, before the unions agreed to sign it.

Not to belabor the point, the Board finds that, from a logical point of view, the National Agreements carried no language binding either the appellant or the unions, should circumstances arise which should require special treatment of a compelling local situation. Otherwise, the local unions could have been hamstrung by the very same measures designed to protect them.

With this tentative issue disposed of, we now proceed to certain findings of fact of the Contracting Officer, as to which the appellant has excepted in its Notice of Appeal. In our examination of them, where necessary, we will first consider the findings themselves; secondly, the proof offered by appellant in support of its exceptions to the findings; and lastly, the evidence adduced in support of the Contracting Officer's findings.

Exceptions of Appellant to the Findings of the Contracting Officer

A. The Electrical Workers

1. The finding (Par. 9) that "the subsistence payments were discontinued and were no longer shown on the payrolls." Appellant apparently objects to the language used as perhaps implying that the subsistence payments were concealed in other entries on the payrolls. Little or no reference was made to this finding at the hearing, and it is considered to have no decisive import.

2. The finding (Par. 10) that "the subsistence component of \$1.10 per hour amounts to somewhat less on the basis of a 40-hour week than the previous \$7.00 per day. Subsistence amounts to \$44.00 per week under the new agreement as compared to \$49.00 per week under the previous agreement."

This exception is based on the fact that the actual pay to Electricians included an average of 7.2 overtime hours per week. Therefore, \$11.55 must be added to the contracting officer's figure of \$44.00, making it \$55.55 per week on the basis of the \$1.10 per hour increase.

The Government did not refute the appellant's figures, so this finding must be regarded as disproven.

3. The finding (Par. 10) that "It is obvious, therefore, that under the contractor's interpretation of the contract, he would be paying out of his own pocket substantially less for electrician labor now than he was at the start of work under the contract."

This finding was proven to be in error for the same reason as in Exception 2 above.

4. The finding (Par. 12) that "Consequently, the decisions of the Secretary of Labor can have no bearing on the question of whether, under this contract, the wage rates include a component for subsistence or other benefits."

This is a conclusion, concerning the argument of the appellant that the new rates for Electricians have become minimum rates for Arizona, as established by the Secretary of Labor for contracts advertised after execution of the Electricians 1958 agreement. It is a question of law, but the Board does not agree that the decisions of the Secretary of Labor can have "no bearing" on our issues. It is negative evidence, as opposed to what would be positive evidence in a hypothetical situation, wherein the Secretary of Labor might have decided that the minimum wage should be \$4.15 per hour, ruling that \$0.75 of the \$4.90 new rate represented expenses paid.

5. The finding (Par. 13) that "Inasmuch as increasing hourly rates were made applicable to the zones as the distance from the starting point (Zone A) increased, it is the conclusion of the contracting officer that the increment over the basic wage rate payable for work in Zone A comprises payments for either 'subsistence,' 'incentive payments' or 'travel allowances,' none of which is subject to adjustment for changes in cost under the contract."

This conclusion is justified only on circumstantial evidence. Testimony of the contracting officer included statements that it was the custom of the electrical industry to pay subsistence to electrical workers; that these workers were itinerants, following construction jobs; that Arizona is the only place known to him where subsistence payments were stopped and increased wages were provided. However, he also testified that these workers were residing at Page; and that payment for travel time or expenses of living away from home was not applicable after the electrical workers had established residence in Page. He also admitted that the \$1.10 increase did not include bonuses, incentive payments, or gratuities, stating "I don't know what it is. * * * All I can say is that it is something besides wages."

The testimony of Mr. Grady,⁶ a labor relations expert, is relied on by Department Counsel, to the effect that the specialty crafts or sub-crafts "fuss around" with their allowances for fringe benefits. "Some of them are putting them in the wage scale. Some of them are getting tremendous pension plans and trading it off for vacation plans." This is inconclusive as to the issues.

⁶ Mr. Jack Grady, of Phoenix, Arizona, called as an expert witness by appellant, has been a labor relations consultant for about 18 years. He has been chairman of the General Construction Industry Negotiating Committee of the Industrial Council in Phoenix since 1947.

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It appears to us that the appellant has shown, in so far as it is obligated to prove the non-existence of alleged facts, that the payment of the \$1.10 increase in wages paid to electricians did not include any of the taboo expenses excluded from escalation. The appellant had nothing to do with the negotiation or signing of any of the Electrical Union agreements, and neither did the electrical sub-contractor, Morgan Electric Company.

Also, in the opinion of the contracting officer, the reason for the increase of \$1.10 per hour at Page, as contrasted with the lower rates for other zones which also involved considerable distances from basing points, was "the fact that we are building Glen Canyon Dam out there and it has an escalation clause in the contract." Therefore, the Government has succeeded only in casting serious doubt on the soundness of the essential findings of the contracting officer in this matter, and there is no other evidence to support them.

6. The finding (Par. 13) that "the contractor's bid must necessarily have contained a component for payment of subsistence throughout the life of the job."

This finding is also a conclusion which is not warranted by the evidence. At the time of bidding, appellant was aware that it would have an opportunity to eliminate subsistence costs by furnishing residence housing and other accommodations. The only support for this conclusion advanced by the Government is the testimony of the contracting officer that it is the practice of the electrical industry in other areas to ordinarily pay subsistence at jobs removed from a union office, throughout the life of the job, irrespective of the length of the job, the availability of housing at the site, or other factors. The contracting officer also testified that he did not know whether the bid included such a component. Neither the appellant nor the Government submitted any documentary proof for the finding. However, it appears to be admitted that appellant's bid was about \$10,000,000.00 lower than that of the next lowest bidder. The evidence is not conclusive upon the question. The finding is also considered to be immaterial and not relevant here.

B. Workers of the Five Basic Crafts

7. The finding (Par. 14) that "The strike was called as a result of the contractor's refusal to pay an 'expense allowance' as defined in the current Arizona Master Labor Agreement, and settlement of the strike was achieved by the contractor's agreement to a \$0.50 per

hour increase above other increases negotiated on a statewide basis."

This was substantially proven by the testimony of the contracting officer and by Exhibit H attached to the Findings of Fact and Decision, dated April 21, 1960. Exhibit H is a statement dated May 25, 1959, issued by the appellant describing its reasons for opposing the renewed payment of expense allowance as provided in the new Arizona Master Labor Agreement.

8. The finding (Par. 20) that "A provision of the above-mentioned national agreements (Par. 15) stipulates that with regard to new labor contracts the contractor shall have an opportunity to participate in negotiations. Officials of Merritt-Chapman & Scott were invited to participate in the negotiations but declined on the ground, as representatives of Merritt-Chapman & Scott have stated, it was much too early to begin negotiations. Merritt-Chapman & Scott did not elect to participate as a party to these negotiations at any later stage and statewide labor agreements were ultimately entered into without their formal participation."

This is substantially correct except that, as appellant's witnesses Helmer and Grady have testified, the appellant did not participate formally or even informally.

9. The finding (Par. 21) that "These agreements cover the entire State of Arizona, and did not exclude the Glen Canyon Dam area as the contractor had previously advised he intended to request the negotiating parties to do."

The contracting officer testified that a representative of the appellant had informed Mr. Wiley, the Bureau of Reclamation project construction engineer, that the appellant intended to make such a request. However, Grady testified that the appellant never made such a request, but that both the AGC and appellant felt that Page ought to be a "free zone." The AGC did attempt to negotiate this point with the unions but the latter refused to agree to make Page a free zone, on the ground that AGC contractors having contracts at Page ought to pay their employees \$6.00 per day expense allowance.

10. The finding (Par. 23) that "This was based on the union's position that the above-mentioned agreements with the parent International and National organizations of the local unions required the contractor to abide by the terms of the state agreements, and the contractor was thus obligated to pay subsistence as provided for in the state agreements."

No evidence submitted by appellant tends to disprove this finding. It was a principal issue in the proceedings before the Arizona State Employment Security Commission. However, it does not involve the issues here, as determined herein, *supra*.

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11. The finding (Par. 25) that "The representatives advised that the contractor was not a party to the new Arizona Master Labor Agreement, and that they operated under National Agreements with the crafts involved."

This refers to a meeting on July 14, 1959, for discussion of the strike with the contracting officer. The evidence supports the finding.

12. The finding (Par. 25) that (with respect to the same meeting), "The contracting officer was asked if the Bureau would make adjustment for wages paid in excess of those applicable under the Arizona Master Labor Agreement provided the contractor ultimately negotiated a job agreement with labor for an increase in hourly wages without a subsistence pay requirement. In response to this request, the contracting officer advised that he would render a decision in the matter upon presentation of a firm agreement reached with labor, but advised the representatives [appellant] that the contract did not, in his opinion authorize or permit adjustment for any form of subsistence payments."

The evidence supports this finding, that such a conversation took place. Appellant's witness Helmer⁷ testified that the request for an advance decision was made for the reason that the Government had made an unsolicited negative determination in the case of the Electricians, before the escalation clause came into operation and appellant felt it should get an advance decision as to the Five Basic Crafts. However, the Electrician's agreement had been in effect for nearly a year.

13. The finding (Par. 26) that "The Contractor requested that he be advised as to whether, if he entered into such an agreement, the Government would consider the increased wage rates resulting from the \$0.50 per hour component subject to escalation under Paragraph 19 of the specifications."

This refers to a meeting in Washington on September 11, 1959, and to a letter dated September 10, 1959, which was presented to the Government at the meeting. The letter is identified as Exhibit K, attached to the Findings of Fact. There appears to be no reason to dispute the contents of the appellant's letter, which attached a schedule of the proposed wage rates. These rates were stated by the appellant in the letter to be the "ultimate in concessions which can be obtained from the unions." This statement turned out to be correct.

14. The finding (Par. 27) that "Accordingly, wholly apart from the question of whether the contractor was entitled to escalation,

⁷ Mr. Clare O. Helmer is the Industrial Relations Director of Merritt-Chapman & Scott Corporation. His experience in this field covers 20 years.

overtures were made to the contractor looking toward an agreement between the parties as to the Government's assuming some part of the proposed \$.50 per hour component as an inducement to the contractor to negotiate a settlement of the strike and resume work."

Since these overtures were made without prejudice and bore no fruit, they are not admissible in evidence in this appeal.

15. The finding (Par. 27) that "However, the Government's intention apparently was misunderstood by the contractor * * *."

This refers to the Government's letter of September 24, 1959, to the appellant. It is not admissible for the same reasons mentioned in Exception 14, *supra*.

16. The finding (Par. 28) that "It appeared to the Government that the agreements between the contractor and the International and National unions would necessarily have a bearing upon this determination. If it were determined that by the terms of the National agreements the contractor was bound to abide by whatever agreements the Associated General Contractors as bargaining agent for the contracting industry and the local Arizona Unions should enter into, then, of course, instead of a strike, the work stoppage at Glen Canyon Dam would be the result of a lockout."

This might have occurred, but did not occur, and the supposed issue involved has been disposed of *supra*.

17. The finding (Par. 28) that "The contractor for a considerable time objected to furnishing these agreements contending that they had no bearing on the problem, but eventually the agreements were furnished."

This finding has been substantially supported by testimony, but the issue involved has been ruled out of this appeal *supra*.

18. The finding (Par. 30) that "These agreements are substantially the same as the Arizona Master Labor Agreements, except that the wage rates specified therein are \$.50 per hour higher than the wage rates provided in the Arizona Master Labor Agreements, and the provision in the State Agreements for a per diem expense allowance on a graduated basis by zones has been deleted."

The evidence presented by appellant shows about 6 differences between the two labor agreements, as discussed *supra*. The testimony of the contracting officer characterized these differences as "cats and dogs" or self-serving declarations. To the extent that such differences must succeed or fail in offsetting the circumstantial evidence offered by the Government to the effect that the appearance of a wage increase following the elimination of subsistence provisions is persuasive of the inclusion of subsistence in the increased wage rates, the Board is convinced that appellant has met its obligation to show that such cir-

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cumstantial evidence is not sufficient to admit of no other possibility than the validity of the Government's thesis. The mere dismissal by the Government of such differences with a general opinion as to their value, does not carry the force necessary for refutation. The finding is, therefore, not supported by substantial evidence.

19. The finding (Par. 31) that "I now proceed to the determination of the question as to what extent, if any, does the \$0.50 per hour component include elements of subsistence or other items excluded by the third subparagraph of specifications Paragraph 19."

This is apparently a general exception to a statement which is not actually a finding. It is obvious that the contracting officer could properly make this statement of an introductory nature.

20. The findings (all of Par. 32) consisting of repetition of previous findings or allegations concerning the cause of the strike; the willingness of the unions to work for the standard statewide rates if they were paid the expense allowance of \$6.00 per day in addition; the increase of \$0.50 per hour over the standard statewide rate and the absence of subsistence as a separate item; that the latter is the only difference between the Project Agreement and the AGC agreement.

These have already been considered separately.

21. The finding (Par. 33) that "I do not deem it necessary to pass on the legal question involved * * *." This was quoted in part, earlier, in connection with overruling the Government's attempt to establish an issue on the theory that the National Agreements bound appellant to the terms of the new AGC agreement with the Basic Crafts. The remainder of the finding excepted to is as follows:

* * * Even if Merritt-Chapman & Scott was not bound by the statewide agreements, the negotiations between the parties to that agreement and the resulting contract may properly be considered as evidence bearing on the nature of the additional 50 cents per hour component subsequently agreed to between Merritt-Chapman & Scott and the unions.

This is all very well, but there is almost no evidence concerning those negotiations for the AGC statewide agreements, or in the resulting contract, which would throw any light on the issues. It was testified by Mr. Grady that the union leaders in the negotiations passed several remarks to the effect that "Don't worry about Merritt-Chapman & Scott—we'll take care of them." This would be indicative of the determination of the unions, discussed *supra*, to get back something from the appellant, Merritt-Chapman & Scott, in the nature of a *quid pro quo* for the loss of subsistence four months previous to the negotiations. However, that does not help the Government's case. As with the other evidence involving the negotiations for the AGC contract and the terms of the contract itself, such evidence is merely circumstantial.

22. The finding (Par. 34) that "and in fact, this was the last remaining issue between industry and the four crafts [excluding the Operating Engineers] before agreement was reached early in May 1959. Although Merritt-Chapman & Scott was not a formal party to these negotiations * * *."

The "last remaining issue," refers to the question of whether Page, Arizona, should be designated as a free city. Whether this was material is not entirely clear, but the appellant proved by testimony of Mr. Grady that it was not true—that the last issue to be decided was the increase in pay for the cement masons. Again, the question of formal or informal participation in the negotiations by the appellant has been shown *supra* to have been no participation of any kind.

23. The finding (Par. 35) that "The unions had in mind the particular situation of Merritt-Chapman & Scott as the principal employer of labor at Glen Canyon Dam when, in the industry-labor negotiations, they refused to yield on their position that subsistence should be paid at Glen Canyon Dam, and they therefore would not accede to the industry position that Page, Arizona, should be designated as an additional free city."

This is highly argumentative if considered as a finding of fact. It would be just as valid to say that the unions had in mind the situation of AGC at Page while negotiating with appellant. The only evidence in this regard was the witness Grady's statement to the effect that it is difficult to know what the unions had in mind. At least, the unions knew that they were on safe ground in not agreeing to make Page a free city for the AGC contractors who had minor contracts in Page. These contractors had not provided any housing or other facilities for their employees and could not expect, and verily, did not deserve to be relieved of the payment of subsistence. Sometimes a few of appellant's facilities were available to AGC employees, on a temporary and uncertain tenure basis, subject to peremptory recall if appellant's employees had need of them. Of secondary consideration to the unions in the AGC negotiations, it seems to us, were their continuing negotiations with appellant. There were, of course, important to the unions, if only from the standpoint of the number of employees involved. But to argue that when the unions were justifiably maintaining their position of not making Page a free city for AGC contractors, these unions had in mind the position of the appellant as the largest employer of labor in the area, seems to us to be not very useful in settling the issues, even if it were true, which no one of the witnesses knows. The Government did not call any union representatives as witnesses, and neither did the appellant.

24. The findings (all of Par. 36) to the effect that the unions at the time of the negotiation with AGC had no intention but that

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appellant would be required to accede to payment of subsistence, because if a more favorable contract to appellant was later agreed to, the "Favored Nations" clause could be invoked by the AGC. The conclusion of this finding is as follows:

Thus, unless the unions intended to deny "free city" status to Merritt-Chapman Scott in the separate negotiations, it would have been an idle act to insist in the negotiations with industry, that Page should not be a free city, since under the "favored nations" clause, Page would become a free city to all contractors if the unions should subsequently make similar concessions to Merritt-Chapman & Scott.

This appears to be a *non sequitur*. To state the converse, the unions could give the AGC the "free city" status as to Page as requested by AGC, if the unions intended to give the same "free city" status to the appellant. The fact is that the unions would not give "free city" status to the AGC because the latter was in no way entitled to it for themselves, unless the unions should establish dispatching offices there, which they studiously avoided, for obvious reasons. On the other hand, there was a serious question as to the union's ability to argue equitably, in May 1959, and thereafter, that the appellant should be compelled to pay subsistence, in view of the arbitrator's decision to the effect that as of January 15, 1959, it was not required and, justifiably, had not been paid since February 2, 1959.

These situations can hardly be reconciled in favor of the Government's argument.

25. The findings (all of Par. 37) to the effect that in abstaining from participation in the negotiations between AGC and the unions, the appellant was aware of the probable consequences, whether or not the ensuing agreement was binding on appellant. To continue:

* * * Accordingly, once a subsistence component had been included in the cost of labor at Page, Arizona, under the terms of statewide agreements, the character of the Page, Arizona area as a subsistence area was firmly and conclusively established. * * *

This of course is a *non sequitur* argument. It does not follow that subsistence allowed to AGC non-resident employees established Page as a subsistence area as to appellant and its resident employees. This finding is merely another method of stating the Government's argument that appellant was automatically bound to the terms of the AGC agreement, by reason of its National agreements, without actually finding this to be so.

26. The finding (all of Par. 38) to the same effect as in Exception 25, *supra*, with the added finding that "Merritt-Chapman & Scott has advanced no reason why it should be subjected to higher hourly wage rates than other contractors and the only reason that could be ad-

vanced is that the additional wage rate component is in settlement of the issue of subsistence, and, insofar as the unions were concerned, this payment of a so-called additional wage component placed them in position to avoid violation of the 'favored nation' clause of the contract."

This finding or argument has been countered and defeated by the appellant in testimony concerning the reasons for the wage increase, as identified earlier in this opinion.

27. The finding (all of Par. 39) that "In view of the facts and circumstances, as stated above, I find that the amount by which the so-called hourly wage paid by the contractor to the workers of the five basic crafts in accordance with the December 22, 1959 agreements exceeds the basic wage rates paid by other contractors in the State of Arizona constitutes a subsistence payment and therefore is not subject to escalation as provided in Paragraph 19, 'Adjustments for Changes in Cost'."

This finding is reversed by the Board because of the absence of proof in its support, as detailed *supra*.

28. The finding (all of Par. 40) that "I find that insofar as the electrical workers are concerned, the difference in wage rates between the A-zones and D-zones is a payment of subsistence, and this portion of the wages paid to electrical workers is therefore not subject to escalation. I find that payment to workers of the five basic crafts in excess of the rates established by the Arizona Master Labor Agreements are payments of subsistence and the excess amounts are not subject to escalation."

We find that the appellant has met its obligation with respect to burden of proof, to show, insofar as absence of something can be shown, that the payments in issue were "wages actually paid" and that no portion of them was "in the form * * * of subsistence" or any other ineligible item under Paragraph 19 of the specifications.

On the other hand, we find that there is a failure of proof on the part of the Government's case. The circumstantial evidence as to the elimination of subsistence and the concurrent or later increase in wages is not sufficient. There is serious doubt that such circumstances create any presumption whatever that subsistence was continued to be paid in the increased wages.³ In fact, the contracting officer frankly admitted that he did not know what the increase in wages represented, except that he considered it to be something in addition to wages.

³ Cf. 31 C.J.S., Evidence, sec. 140-6: "Ordinarily, there is no presumption that a state of facts or conditions which is shown to exist will continue to exist in the future." (Citing *Foster v. Adcock*, 161 Tenn. 217, 30 S.W. 2d 239, 70 A.L.R. 569 (1930)).

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Although this seems to be a case of first impression as to wages alleged to be paid in lieu of or to include subsistence, the increase in wages alone, or wage variances exceeding the statewide industry rates have been present in other contracts, as admitted by the contracting officer. These contracts were for construction of dams at Hungry Horse, Montana; Flaming Gorge, Utah; and Canyon Ferry, Montana. The variances amounted to \$0.15 and \$0.20 per hour. Escalation has been in operation at the Flaming Gorge Project on wages including a \$0.20 increase over statewide rates, pursuant to contract escalation provisions almost exactly the same as in the instant case. However, the contracting officer stated that as a result of this matter, the Flaming Gorge situation is being re-examined.

Therefore, it appears that there is a practice, not uncommon, for dam contractors in remote areas to pay higher wages than the statewide rates.

In composing the language of the third subparagraph of Paragraph 19 of the specifications, the phrase "in the form of * * * subsistence payments" was undoubtedly used advisedly. In order to identify payments as subsistence payments, a recognizable form is required. Otherwise, if the language had simply prohibited escalation of "wages which are actually subsistence payments" there would be endless disputes. The term "subsistence" is generally defined as the means of existing, or maintaining life. Under that definition, it could be said that practically all of a worker's wages are used for his "subsistence" or that of his family.

Under all of the circumstances, the Board considers that the appellant is here entitled to that measure of protection, promised by the Government in the contract, against rises in the costs of labor.

As to the issues described herein, *supra*, we find that the payments of increased wages of \$1.10 and \$0.50 per hour made by appellant to its employees pursuant to the 1958-1959 Electricians Agreement, and pursuant to the Project Agreements of December 22, 1959, with the Five Basic Crafts, respectively, for work performed after May 31, 1959, are wages actually paid, within the meaning of Paragraph 19 of the Specifications No. DC-4825 of the contract.

We further find that no portions of such wage payments of \$1.10 and \$0.50 per hour, made by appellant to its employees pursuant to the 1958-1959 Electricians Agreement, and to the Project Agreements of December 22, 1959, respectively, are in the form of bonuses, incentive payments, or gratuities, subsistence payments, and travel allowances, within the meaning of Paragraph 19 of Specifications No. DC-4825 of the contract.

Conclusion

Accordingly, the appeal is sustained and the case is remanded to the contracting officer, for proceeding with the adjustments contemplated and provided by the contract escalation provisions pursuant to our two findings, *supra*.

THOMAS M. DURSTON, *Member*.

I concur:

ARTHUR O. ALLEN, *Alternate Member*.

PAUL H. GANTT, Chairman, disqualified himself from participation in the consideration of this appeal. (43 CFR 4.2)

UNITED STATES v. J. R. HENDERSON

A-28496

Decided January 13, 1961

Mining Claims: Common Varieties of Minerals

Sand and gravel suitable for all construction purposes, free from deleterious substances and having proportions of sand and gravel which meet construction specifications without expensive processing, but used only for the same purposes as other widely available, but less desirable deposits of sand and gravel, are common varieties of sand and gravel and not locatable under the mining laws since these facts do not give them a special, distinct value.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

J. R. Henderson has appealed to the Secretary of the Interior from a decision of the Acting Director of the Bureau of Land Management dated April 18, 1960, that affirmed a decision of a hearing examiner dated December 29, 1959, declaring null and void his placer mining claims, the Dickie, Big Hall, Sandy and Teddie, all in Clark County, about 2 miles south southwest of Whitney, Nevada.

The claims were located on public land of the United States on April 4, 1957, and quitclaimed by the locators to the appellant on June 28, 1957. On May 6, 1959, the United States contested the validity of the claims by filing charges that minerals have not been found within the limits of the claims in sufficient quantity or quality to constitute a valid discovery and that the materials found within the limits of the claims are not valuable mineral deposits under section 3 of the act of July 23, 1955 (30 U.S.C., 1958 ed., sec. 611). The appellant denied the charges and a hearing was held on September 15, 1959.

At the hearing, the United States conceded that there are large quantities of sand and gravel suitable for construction purposes on

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the claims and that the appellant has dug large pits exposing these materials to view and has removed considerable amounts of them. Its witness stated that the sand and gravel have been formed from volcanic rock so that they are harder than such materials formed from sedimentary rock and are of the same nature as other sand and gravel found in an area about 2½ miles wide by 7 miles long and that both are of good quality and not cemented or mixed with caliche. It contended, however, that the claims are invalid because common varieties of sand and gravel are not locatable minerals under the act of July 23, 1955 (*supra*), and that the appellant had not shown that the sand and gravel in question are valuable because they have any properties giving them special and distinct value which cause them to constitute an exception to the provisions of the statute. The contestant's evidence confirmed this view of the nature of the findings on the claims but the appellant contended that the claims are valid because of the exception recognized in the statute. The hearing examiner and the Acting Director held that no showing of a discovery of a locatable mineral had been made and declared the claims null and void for that reason.

On appeal to the Secretary of the Interior, the appellant makes the same contention so that the sole question to be determined is whether the minerals found on the claims under contest may be the subject of location under the mining law.

Section 3 of the act of July 3, 1955 (*supra*), amended the mining laws by removing certain materials from the category of valuable mineral deposits. It provides:

A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity to any mining claim hereafter located under such mining laws: *Provided, however,* That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common varieties" as used in this Act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value * * *

The appellant does not rely upon some other mineral in or in association with sand and gravel; his case rests upon an alleged discovery of sand and gravel on the claims which he contends have characteristics giving them distinct and special value.

His evidence shows that the deposits on the claims contain hard sand and gravel free from blow sand and caliche (Tr. 67, 69)¹ of the

¹ These and subsequent references are to the appropriate pages of the transcript of the hearing in this case.

proper size and gradation in size and mixed in proportions very close to the perfect percentage for construction use (Tr. 69, 70) so that it is possible to use or sell pit run material which meets construction specifications for concrete aggregate (Tr. 60) and, because of the sharpness of the grains, to sell the sand for mortar and plaster (Tr. 76). The area wherein such deposits are found is about $3\frac{1}{2}$ miles wide and 7 miles in length (Tr. 88) but the claims are adjacent or near to the appellant's patented land where the processing plant and the well which furnishes water for washing are located so that it is economically advantageous for him to work them from the existing plant (Tr. 88). There is a ready market for ready mix concrete and plaster and mortar sand in the vicinity (Tr. 25-53).

The appellant's evidence also showed that concrete made from aggregate produced on the claims can be ground and polished to produce an attractive stone of various muted shades of cream, coral, brown, purple, gray and black in irregular shapes and surrounded by the light gray of the concrete mix. The result is an acceptable substitute for terrazzo, the marble for which is normally shipped in from Italy or Georgia (Tr. 71-72). This so-called poor man's terrazzo has been used in the rotunda area and entrance walkways of the Clark County convention hall, in the hospital at Henderson and several of the Las Vegas schools (Tr. 73). The appellant submitted a sample as his exhibit A at the hearing which he explained was the polished product obtained by sawing a slice from a concrete test cylinder made from the aggregate (Tr. 71-72). Other aggregate not of volcanic origin used in this manner would present only a contrast between the light gray of the concrete and the darker gray of the cross sections of the aggregate (Tr. 90-91).

The conclusions to be drawn from the appellant's evidence are that the sand and gravel found on the contested claims are of good quality and suitable in every way for concrete aggregate as extracted from the pit or with some blending of materials taken from deep and shallow pits (Tr. 70). The value of these materials to the appellant is derived from their good quality as building materials without expensive processing, their location close to his processing plant and the lack of caliche (Tr. 81). Their use in the terrazzo substitute is not a demonstration of special and distinct value since it is limited in amount and restricted to local use. The predominant use of the sand and gravel is for ordinary construction purposes. The appellant did not even suggest that he contemplates shipping aggregate out of the area for widespread use. The distinct and special value for which he contends consists only of the factors which make the materials suitable for his particular local business and cause his processing costs to be

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low and thus give the materials more value to him than like materials in the area.

The Senate report on a companion bill (S. 1713) under consideration at the same time as the bill which became the act of July 23, 1955, declares that—

The proviso in this section reading—

* * * nothing herein contained shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit—

has been incorporated in the bill to make clear the committee intent to not preclude mining locations based on discovery of some mineral other than a common variety of sand, stone, etc., occurring in such materials, such as, for example, a mining location based on a discovery of gold in sand or gravel.

The last sentence of this section declares that—

“Common varieties” as used in this act does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value * * *.

This language is intended to exclude from disposal under the Materials Act materials that are commercially valuable because of “distinct and special” properties, such as, for example, limestone suitable for use in the production of cement, metallurgical or chemical-grade limestone, gypsum, and the like. (Sen. Rept. No. 554, 84th Cong., 1st Sess., pp. 7-8.)

The House report on the bill which became the act of July 23, 1955 (H.R. 589), also notes that the language of the bill excludes “material such as limestone, gypsum, etc., commercially valuable because of ‘distinct and special’ properties.” (House Rept. No. 730, 84th Cong., 1st Sess., p. 9.)

The pertinent regulation provides:

(b) “Common varieties” as defined by decision of the Department and of the courts include deposits which, although they may have value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts do not possess a distinct, special economic value for such use over and above the normal uses of the general run of such deposits. Section 3² of the law has no application where the mineral for which a location is made is carried in or borne by one of such common varieties.

These observations do not lend support to the appellant’s contention that he has a discovery of sand and gravel possessing special and distinct value. They indicate, rather, that there was no contemplation that sand and gravel suitable for construction purposes would be regarded as anything but common varieties of these materials.

The fact that these sand and gravel deposits may have characteristics superior to those of other sand and gravel deposits does not make them an uncommon variety of sand and gravel so long as they are

² “Thus, while marble would not be a common variety of stone, ordinary building stone or sand and gravel or pumice or limestone used in building would be.” (43 CFR, 1959 Supp., 185.121(b)).

used only for the same purposes as other deposits which are widely and readily available. See *United States v. Duwall & Russell*, 65 I.D. 458, 462 (1958).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director of the Bureau of Land Management is affirmed.

THEODORE F. STEVENS, *The Solicitor*.

BY: EDMUND T. FRITZ,
Deputy Solicitor.

APPEAL OF WICKES ENGINEERING AND CONSTRUCTION CO.

IBCA-191

Decided January 18, 1961

Contracts: Changes and Extras—Contracts: Modification

A price adjustment determined by the contracting officer through the procedures established by the contract, when duly accepted or otherwise agreed to by the contractor, constitutes a valid modification of or supplement to the contract terms that cannot thereafter be unilaterally altered by the contracting officer.

BOARD OF CONTRACT APPEALS

The Department Counsel has moved for reconsideration of that portion of the Board's original decision in this case, rendered on November 30, 1960, which sustained the appeal as to Claim A. The motion asserts that the Board's holding is inconsistent with those made in the case of *Salem Products Corporation* by the Armed Services Board of Contract Appeals¹ and the Comptroller General.²

In our original decision with respect to Claim A we ruled that appellant was entitled to be paid for unanticipated rock excavation the sum of \$41,487.58 provided in Change Order No. 3, without deduction of the credit of \$1,371.49 for the earth excavation displaced by such rock excavation that was subsequently attempted to be provided in Change Order No. 4.

This ruling was based on the view that the terms of Change Order No. 3 set forth a determination—made through the procedures established by the contract—of the amount to be paid for the unanticipated rock excavation which, having been duly agreed to in writings signed by both parties or their authorized representatives, constituted a valid modification of or supplement to the contract terms.

¹ ASBCA Nos. 4320 and 4698, 58-2 BCA par. 1944 (September 29, 1958), modified on reconsideration, 59-2 BCA par. 2364 (September 16, 1959).

² 39 Comp. Gen. 726 (April 26, 1960).

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The price adjustment thus mutually adopted was, in our opinion, no more subject to alteration through the unilateral action of one party on account of circumstances within the scope of such adjustment than was the original contract price on account of circumstances within its scope.

The binding effect of agreements of this nature is amply supported by authority. A partial citation of precedents appears in our original decision. Some of the many others are cited in the margin.³ Usually, the issue has been raised in the form of an attempt by a contractor to increase the amount of an adjustment of time or money to which both parties had previously agreed. In those cases where, as here, the issue has been presented in the form of an attempt by the Government to reduce such an amount, the binding effect of the adjustment previously agreed upon has, however, likewise been recognized, and the deduction or credit sought by the Government has been denied.⁴ As was said in one of these latter decisions:

The change order having been duly executed by both parties, and the contracting officer having acted by virtue of the authority vested in him, it was then beyond his power and beyond the power of his superior officers to revoke his act, without appellant's consent. A valid modification of the contract terms had been accomplished, binding on the appellant and on the Government.⁵

Ordinarily, the assent of the contractor to the Government's determination of the amount of time or money to be allowed is manifested by an acceptance executed by the contractor after the contracting officer or his authorized representative has issued a change order evidencing the Government's determination of the amount. Such assent, however, may also be validly manifested by a proposal to accept a particular amount—identical with that subsequently determined upon by the Government—executed by the contractor in advance of the issuance of the change order,⁶ as was done in the case now before us.

There is nothing in the *Salem Products Corporation* decisions at variance with these well-settled principles, for that case did not in-

³ *Hargrave v. United States*, 132 C. Cl. 73, 78-80 (1955); *Tobin Quarries, Inc. v. United States*, 114 Ct. Cl. 286, 333-34 (1949); *Coath & Goss, Inc. v. United States*, 101 Ct. Cl. 653, 661 (1944); *Frazier-Davis Construction Company v. United States*, 97 Ct. Cl. 1, 53-56 (1942); *Arundel Corporation v. United States*, 96 Ct. Cl. 77, 122-23 (1942); *Great Lakes Construction Company v. United States*, 95 Ct. Cl. 479, 500-01 (1942); *Chas. I. Cunningham Co.*, IBCA-60, 64 I.D. 449, 456, 57-2 BCA par. 1541 (December 6, 1957); *Fischbach and Moore*, IBCA-26, 6 CCF par. 61,686 (July 25, 1955); *B. J. Lucarelli & Co., Inc.*, ASBCA No. 4768, 59-2 BCA par. 2353 (September 29, 1959); *Shirtecraft Company, Inc.*, ASBCA No. 2819 (November 30, 1955); *de Koning Construction Company*, W.D. BCA No. 1423, 4 CCF par. 60,358 (June 30, 1947); *Kuckenberg Construction Company*, Eng. C & A Board No. 507 (September 14, 1954). *Cf. Sanders v. United States*, 104 Ct. Cl. 1, 23 (1945).

⁴ *Montgomery Construction Company*, ASBCA No. 2556 (January 23, 1956); *Kerby Saunders, Inc.*, W.D. BCA No. 865, 3 CCF 1079 (August 30, 1945).

⁵ *Kerby Saunders, Inc.*, *supra* note 4.

⁶ *Irwin & Leighton v. United States*, 104 Ct. Cl. 84, 98-102, 109-10 (1945).

volve an attempt to upset a price adjustment which had been previously agreed to by both parties. The case grew out of a deviation from the specifications that was authorized by the contracting officer, at the request of the contractor. The letter of authorization stated that the deviation was permitted "providing same is accomplished at no additional cost to the Government," but did not purport to decide whether the contract price should be reduced, because of savings that might be effected by the contractor in consequence of the deviation, and, if so, by what amount. More than three years after the completion of the contract work, a successor contracting officer raised for the first time the question of savings, and, after investigation of the facts, made a determination in which he found that certain savings had been realized and that the Government was entitled to reduce the contract price by a certain amount because of them. The contractor attacked this determination, first, through an appeal to the Armed Services Board of Contract Appeals and, secondly, through the submission of a claim to the Comptroller General. The Board and the Comptroller General held that the deviation authorized by the contracting officer amounted to a change in the specifications, that the cost of performing the contract work was decreased as a result of this deviation, that under the "changes" clause of the contract the Government was entitled to an equitable adjustment in the contract price on account of the savings thus realized by the contractor, and that this right had not been lost by reason of the delay of the Government in making a determination of the existence and amount of the right.

As the foregoing summary shows, the *Salem Products Corporation* case presented no issue with respect to the binding effect of a contracting officer's price determination that has been incorporated in an accepted change order, or that has been agreed to in some other manner by the contractor. No discussion of the law applicable to such a determination appears in the decisions of the Armed Services Board of Contract Appeals and the Comptroller General upon that case. Hence, those decisions are not precedents which would be pertinent to the instant appeal.

The motion for reconsideration, accordingly, is denied.

HERBERT J. SLAUGHTER, *Member*.

I concur:

JOHN J. HYNES, *Member*.

PAUL H. GANTT, *Chairman*.

*January 18, 1961***APPEAL OF LAYNE AND BOWLER EXPORT CORPORATION****IBCA-245***Decided January 18, 1961 ****Contracts: Changes and Extras**

An excusable delay caused by a change in specifications will be computed from the first date of actual delay, and not from the date of award of the contract as representing time lost in designing, scheduling, and placing subcontracts.

Contracts: Delays of Contractor—Contracts: Subcontractors and Suppliers

Under a supply contract Default Clause, a delay caused by manufacturing difficulties encountered by a second-tier subcontractor is not excusable to the prime contractor, since that cause is not among the illustrative examples in the Default Clause and is not equatable to such examples.

BOARD OF CONTRACT APPEALS

The appellant has filed a timely notice of appeal on June 10, 1960, from the Findings of Fact of the Contracting Officer, dated May 11, 1960. The appeal is submitted on the record.

The contract was awarded to appellant on June 18, 1956, and provided for the furnishing of two diesel-electric generating sets, three sets of 2-motor-driven pumping units, control equipment and three transformers. These items were to be delivered at Beirut, Lebanon, within 315 days from the award date, or by April 29, 1957. The total contract price was \$90,355.00.

The contract was executed on Standard Form 32 (Nov. 1949 Ed.) and contained a number of Special Conditions, including provisions in Paragraph B-9 and in Paragraph B-10 (amending Clause 11 of S.F. 32) for liquidated damages at \$50.00 per day for late delivery. Subsequently, the delivery date was extended, by Change Order No. 1, to July 28, 1957. All equipment required, except for six 95-hp motors, was delivered on time. The motors were delivered on January 29, 1958, after a delay of 185 days from July 28, 1957. Liquidated damages would amount to \$9,250.00.

The Contracting Officer had made previous Findings of Fact dated October 9, 1959, excusing the delays to the extent of 90 days (already allowed by Change Order No. 1), from which the contractor appealed (IBCA-225). However, the Contracting Officer later withdrew those findings with the concurrence of the appellant. In the later Findings of Fact for the current appeal, the Contracting Officer allowed an additional 115 days of excusable delay, because of a proposed change

*Not in chronological order.

in voltage requirements (37 days), and shortage of shipping space due to the closing of the Suez Canal (78 days).

These excusable delays further extended the time for performance to November 20, 1957, reducing the unexcused delay in delivery to 70 days. The appellant claims that this remaining delay was excusable because of difficulties encountered by its subcontractor (2nd tier) in the manufacture of bearings for the motors, involving a delay of 138 days. It does not appear that an appeal was taken by appellant on the basis of insufficiency of the extension of 37 days, from August 20, 1956 to September 26, 1956, allowed by the Contracting Officer because of proposed changes in voltage requirements, as opposed to its original claim of 75 days. However, it is claimed that Change Order No. 1, which allowed 90 days excusable delay because of design re-evaluation as a result of relocation of the site of the pumping plant, from September 27, 1956 to December 25, 1956, should have granted an extension of 169 days, from June 18, 1956 to December 4, 1956. Essentially, this amounts to a claim of excusable delay from June 18, 1956 (the award date) to August 20, 1956, as the subsequent delays to December 4, 1956, and beyond, have been excused.

Claim No. 1—Delay in Delivery of Bearings

The bearings for the motors were manufactured by SKF Company in Sweden, under a purchase order issued by the Brush Electrical Engineering Company, Ltd., of England, the 1st tier subcontractor for the 6 electric motors. The bearings (and motors) were originally scheduled for shipment on February 6, 1957, but as a result of changes in the pumps, shipment was rescheduled for April 1957. The bearings were actually delivered on June 15, 1957. However, Brush Electrical Engineering Company, Ltd., found the bearings to be unsatisfactory when tested with the motors. Replacement bearings were not received until some time in October 1957. The completed motors with bearings were ready for shipment on October 31, 1957. This delay has not been shown to be excusable under the applicable provisions of the contract.¹

¹ Clause 11(b) of S.F. 32, as amended by Paragraph A-9 of the Special Conditions, quoted herein pertinent part as follows: "(b) The contractor shall not be liable for any excess cost if any failure to perform the contract arises out of causes beyond the control and without the fault or negligence of the contractor * * *. Such causes include, but are not restricted to, acts of God or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, and defaults of subcontractors, due to any of these causes * * *." (Emphasis added.) Paragraph B-10 of the Special Conditions makes the foregoing determinative as to liability for liquidated damages, as follows: "* * * That the contractor shall not be charged with liquidated damages when the delay in delivery is due to excusable causes as defined above in Paragraph (b), of the clause and/or delays of a subcontractor due to such causes, unless the contracting officer shall determine that the materials or supplies to be furnished under the subcontract are procurable in the open market * * *."

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Although the Board is familiar with the doctrine expressed in the *Andresen* case,² that doctrine is not followed by this Board.³ Moreover, the *Andresen* ruling has been disregarded by the Court of Claims in the *Whitlock* case⁴ and by the Comptroller General.⁵

The principle followed by the Board in this appeal stems from the plain meaning of the contract language. That language requires that, in order for a delay of a subcontractor of whatever tier, to be excusable, it must have arisen out of causes beyond the control and without the fault or negligence of the prime contractor or of the subcontractor, such as those causes enumerated in the Default clause quoted *supra*. Those causes enumerated are not exclusive and it is admittedly difficult to specify possible additional causes which could be excusable in any case. In this appeal, it appears that the cause of failure implied, in the late delivery of the bearings, was the unexplained difficulty encountered by SKF Company in making bearings suitable for the intended purpose. Appellant has not offered any evidence regarding the cause of the failure.

It is well settled that difficulty attending the performance of a contract is not an excusable cause of delay.⁶ In our opinion, a cause of delay not among those enumerated in the contract must be equitable to them⁷ and must meet the same test as do the illustrative examples, i.e., it must be a cause beyond the control and without the fault or negligence of the contractor or subcontractor, in the nature of *force majeure*.⁸

² *John Andresen & Co.*, ASBCA No. 633, 5 CCF par. 61,182 (1950), holding that a prime is excused from nonperformance or delays, to the extent that they render performance impossible, by defaults of subcontractors or suppliers if such defaults cannot be charged to the fault or negligence of the prime contractor, and that it is immaterial whether or not the default of the subcontractor can be placed under one of the enumerated causes for excusability, because such enumerated causes are illustrative and not exclusive.

³ *Cf. Industrial Service & Engineering Company*, IBCA-235 (July 28, 1960), 67 I.D. 308, 60-2 BCA par. 2701, 2 Govt. Contr. par. 432; *Eagle Construction Corp.*, IBCA-230 (July 18, 1960), 60-2 BCA par. 2703, 2 Govt. Contr. par. 422; *Truax Mach. & Tool Co.*, IBCA-195 (July 21, 1959), 59-2 BCA par. 2280, 1 Govt. Contr. par. 563.

⁴ *Whitlock v. United States*, 141 Ct. Cl. 758 (1958).

⁵ Dec. Comp. Gen. B-144043 (November 17, 1960), upholding the decision of this Board in *Industrial Service and Engineering Company*, cited Fn. 3, *supra*; 39 Comp. Gen. Dec. 343-48 (1959).

⁶ *Carnegie Steel Company v. United States*, 240 U.S. 156 (1916); *United States v. Gleason*, 175 U.S. 588, 602 (1900); *Monarch Forge & Machine Works*, IBCA-218 (October 21, 1960), 60-2 BCA par. 2835, 2 Govt. Contr. par. 568(i).

⁷ Comp. Gen. Dec. B-140166 (October 30, 1959).

⁸ "*Force majeure*, or * * * *vis major*, is not necessarily limited to the equivalent of an act of God. The test is whether under the particular circumstances there was such an insuperable interference occurring without the party's intervention as could not have been prevented by the exercise of prudence, diligence and care." *Mathes v. City of Long Beach*, 121 Cal. App. 2d 473, 263 P. 2d 472-74 (1953); *Pacific Vegetable Oil Corp. v. C.S.T. Ltd.*, 29 Cal. 2d 228-38 (1946), citing *National Carbon Co. v. Bankers' Mortgage Co.*, 77 F. 2d 614-17 (1935).

Claim No. 2—Additional Delay Caused by Relocation

In connection with the relocation of the pumping station, the appellant was allowed, by Change Order No. 1, an excusable delay of 90 days from September 27, 1956, to December 25, 1956. The relocation of the pumping station and the abortive proposed change in voltage requirements were both brought to the attention of appellant about August 20, 1956. The appellant claims that because of the changes required, all of the time spent in planning, scheduling and designing from the date of the award, June 18, 1956, to August 20, 1956, were lost; that it was unable to begin to reschedule production of the pumps and motors until December 4, 1956. The contracting officer has allowed a total of 127 days to December 25, 1956, including the 37 days described *supra*, but the appellant considers that the period from June 18, 1956, to August 20, 1956, is representative of the additional time required for getting started again after December 4, 1956.

The Board cannot accept this concept, and it is hardly cogent reasoning in view of the fact that, except for the delay in initial delivery, and the rejection of the defective bearings, the delay should not have exceeded 111 days, or from February 6, 1957 to May 28, 1957. The motors and bearings were originally scheduled for shipment on February 6, 1957, and as a result of Change Order No. 1, the bearings were to be delivered by April 30, 1957. The motors were ready except for the bearings in April 1957. Four weeks were required for assembly of the bearings and motors, testing and preparation for shipment. Even if the bearings had been suitable when actually delivered 45 days late on June 15, 1957, there would have been no unexcusable delay, for the extension of 127 days granted by the Contracting Officer would have made the contract completion date September 3, 1957. Allowing the established four weeks for assembly, testing and preparation for shipment, the completed motors could have been shipped by July 13, 1957.

The appellant has not furnished any evidence tending to refute these figures, and has not supplied any information as to the actual time required, after December 4, 1956, for rescheduling, starting up production again, notifying subcontractors of reinstated orders, etc. From December 4, 1956, to December 25, 1956, is 21 days and this was apparently ample for the purpose.

There being no preponderance of substantial evidence to refute the finding of the contracting officer, that finding will not be disturbed.⁹ Claim No. 2 is therefore denied.

⁹ *Penker Construction Co. v. United States*, 96 Ct. Cl. 1, 50 (1942); *Imperato Stevedoring Corp.*, ASBCA No. 2266 (October 25, 1954); *A. C. McKinnon, d/b/a McKinnon Construction Co.*, IBCA-4 (1955), 62 I.D. 164 6 CCF par. 61,653.

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As stated *supra*, the appellant does not appear to have challenged the adequacy of the allowance of 37 days excusable delay from August 20, 1956, to September 26, 1956, due to consideration of possible changes in voltage requirements, as compared with appellant's request for 75 days excusable delay. In any event, any further allowance for this cause would be concurrent with other excused delay. To the extent, however, that it is considered to have been appealed in this proceeding, the appeal as to this claim is denied for the reasons stated as to Claim No. 2, *supra*.

Conclusion

The appeal is denied in its entirety.

THOMAS M. DURSTON, *Member*.

We concur:

PAUL H. GANIT, *Chairman*.

JOHN J. HYNES, *Member*.

APPEAL OF DANE CONSTRUCTION CORPORATION

IBCA-261

Decided February 1, 1961

Rules of Practice: Appeals: Statement of Reasons

Where the only reason stated by a contractor for the taking of an appeal is a failure by the contracting officer to provide certain information, and where the contracting officer thereupon undertakes to provide such information, the appeal will be dismissed as moot. If, however, the circumstances show that it would have been difficult for the contractor to frame an adequate statement of reasons without having the requested information, leave to reinstate the appeal within a reasonable time after receipt of such information will be granted in the order of dismissal.

BOARD OF CONTRACT APPEALS

This appeal springs from a claim for additional compensation, designated Claim No. 1, that has formed part of the subject of two earlier appeals, IBCA-135 and IBCA-255, by the same contractor under the same contract. The Board in its decision of February 15, 1960, upon IBCA-135 remanded a portion of Claim No. 1 to the contracting officer for redetermination in particulars that were specified by that decision. The redeterminations made pursuant to this direction (together with redeterminations pertaining to another claim that have since been set aside) were incorporated in findings of fact issued by the

contracting officer under date of August 10, 1960. The contractor took an appeal from the redeterminations, which was docketed as IBCA-255. A decision on the second appeal was initially issued on October 31, 1960, and, following a motion by the Government for reconsideration, was reissued in a modified form on December 1, 1960. Insofar as Claim No. 1 is concerned, this latter decision dismissed the appeal on the ground that the notice of appeal stated no reasons why the contracting officer's redeterminations were deemed erroneous, but gave leave to reinstate the appeal upon the filing of a statement of such reasons within 14 days.

The notice of appeal now before us asks that the appeal with respect to Claim No. 1 be reinstated, and assigns the following reasons for this request:

On Page 18 of Mr. Slaughter's Opinion dated February 15, 1960, he directed that it be determined what number of the sixty-two piles which were alleged to be out-of-plumb transversely were, in fact, within the contract tolerances. The Contracting Officer has stated that fifty of the piles were within the contract tolerances for plumbness and the remaining twelve piles were disqualified. It is not clear to the appellant what the source of information is upon which the Contracting Officer relies in making this determination.

During the presentation of the evidence, Mr. Slaughter directed that the Engineer produce the field notes which would have provided the appellant with an opportunity to compare the same with its own information. This was not done and we assume that no field notes were kept. It would be of considerable help to the appellant if such information upon which the Contracting Officer has based its conclusions may be made available to or viewed by the appellant.

Subsequent to the filing of this notice of appeal, the Department Counsel submitted to the Board a memorandum in which he states:

This is to inform you that the Contracting Officer will send to the contractor the data upon which he based his determination that twelve piles were not within the contract tolerances for plumbness.

This memorandum would indicate that the appeal is now moot since the contracting officer has undertaken to furnish to the contractor the information requested in the notice of appeal, and since the lack of this information is the only reason for the taking of the present appeal which the contractor has made known to the Board.

As the contractor was expressly put on notice of the necessity for a statement of reasons by our decision of December 1, 1960, it might well be questioned whether any further opportunity to submit such a statement ought to be accorded it. On the other hand, the difficulty of framing an adequate statement of reasons in the absence of the information now being furnished by the contracting officer is understandable. In the particular circumstances of this case we believe that, while on the record before us the appeal must be dismissed as

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moot, the contractor should be allowed a further opportunity to reinstate the appeal if, after receiving the information in question, it considers that the contracting officer's findings of fact of August 10, 1960, with respect to Claim No. 1 are inconsistent with the Board's decision of February 15, 1960, in IBCA-135.

CONCLUSION

The present appeal, therefore, is dismissed and the appellant is extended leave to reinstate its appeal with respect to Claim No. 1 by filing a new notice of appeal. Such notice, if filed, must state reasons why the findings of fact of August 10, 1960, are deemed erroneous as to that claim, and must be filed with the Board within 14 days after the appellant has received the information mentioned in the above-quoted memorandum of the Department Counsel, or within 14 days after the appellant has received a copy of this decision, whichever occurs later.

HERBERT J. SLAUGHTER, *Member*.

We concur:

PAUL H. GANTT, *Chairman*.

JOHN J. HYNES, *Member*.

HARRY E. NICHOLS ET AL.

A-28463

Decided February 27, 1961

Mining Claims: Lands Subject To—Small Tract Act: Generally

Where land is classified as suitable for disposition as a small tract pursuant to an application filed by an applicant who gains a preference right to a lease or purchase of the tract as a result of the classification, a mineral location made after the application was filed but before the land was classified becomes invalid.

Mining Claims: Lands Subject To—Small Tract Act: Generally

The fact that land is covered by a small tract application or that the Department on its own initiative is considering it for disposition as a small tract does not remove it from mineral location.

Mining Claims: Lands Subject To—Small Tract Act: Generally

Where the land office has been notified that land is under consideration for small tract purposes prior to the filing of a small tract application, the land remains open to mineral location and a later small tract classification will not render invalid an otherwise valid mining claim located prior to that classification.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Harry E. Nichols has appealed to the Secretary of the Interior from so much of a decision dated March 23, 1960, of the Director of the Bureau of Land Management as affirmed a decision of the manager of the Phoenix land office holding his placer mining claim invalid in part.

The appellant's mining claim, called the Granit Knowles Placer, was located on April 16, 1953, for the S $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 27, T. 4 N., R. 3 E., G. & S. R. M., Arizona.

Many years earlier, in 1937, Harry E. Myers had located the Homestead No. 2 lode mining claim, falling for the most part in the SW $\frac{1}{4}$ NE $\frac{1}{4}$ of the same section 27. It appears that he did work on the claim during the next 12 or 13 years and constructed a two room cement brick house, a well, and a pumphouse. Upon his death in 1949, the claim passed to Mrs. Verla Nightingale, his daughter, who, on July 17, 1950, filed an application, Arizona 0392, for a mineral patent, claiming that a lode or vein consisting of quartz containing gold, silver and copper had been found on the claim. After a mineral examination had been made, Contest No. 9907 was initiated against the claim on the grounds that a valid discovery of a valuable mineral had not been made within the limits of the claim and that the land was nonmineral in character.

Mrs. Nightingale visited the land office in Phoenix and then the regional office in Albuquerque. It appears that from her discussions with the personnel in those offices, she became convinced that she had little chance of prevailing on her mineral application. In order to protect the improvements her father had built she filed a small tract application, Arizona 02253, on October 5, 1951, for the W $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 27 in which the house and well stood. On October 15, 1951, she amended her application to describe instead the E $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ and Gus Lunsford, her son-in-law, filed a small tract application, Arizona 02270, for the W $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$, the land in Mrs. Nightingale's original application.

Again it appears that this step was taken on the advice of Bureau personnel who noted that the land applied for was under consideration for small tract classification, that Mrs. Nightingale was not a veteran of World War II, that she would have no preference right and that Lunsford was a World War II veteran.¹

¹ Since the land had already been placed under consideration for small tract classification, an applicant filing thereafter gained no preference, but veterans had a 90-day preference right to file after the lands were classified. 43 CFR, 1950 Supp., 257.6(a) and (b).

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In November 1951, the regional office first advised Mrs. Nightingale that upon the withdrawal of her mineral application, the small tract applications would be processed and then that a relinquishment of her mining claim filed in the land office would expedite the issuance of a small tract lease to her son-in-law. It appears that on November 14, 1951, Mrs. Nightingale filed a relinquishment of her application for a mineral patent² and withdrew her request for a hearing on the contest charges. On November 16, 1951, the manager held the charges were taken as confessed and declared the claim null and void.

On April 16, 1953, Harry E. Nichols and three other persons, whose interest he has since acquired, located the Granit Knowles placer claim on lot 7 and the SE $\frac{1}{4}$ NE $\frac{1}{4}$ (comprising the S $\frac{1}{2}$ NE $\frac{1}{4}$) of section 27. He also relocated the Homestead No. 2 lode claim. His wife, Viola M. Nichols, and her son, Joseph G. Boursaw, relocated the adjoining Ida Bell No. 3 lode claim and Nichols located two other lode claims in the S $\frac{1}{2}$ NE $\frac{1}{4}$ sec. 27. All of these lode claims are now held by the appellant who, in his pending application for a mineral patent, states that "exploratory work on said four (4) lode mining claims revealed no minerals, in lode formation, on the portions of said lode claims which are within the limits of said GRANIT KNOWLES MINING CLAIM, of such extent or of sufficient richness to warrant further development thereof."

On August 13, 1956, the N $\frac{1}{2}$ and the N $\frac{1}{2}$ S $\frac{1}{2}$ sec. 27, except patented lands, and other lands in secs. 21 and 22, T. 4 N., R. 3 E., G. & S. R. M., were classified as suitable for lease and sale as small tracts for residence purposes, by classification order 52 which provided in pertinent part

3. The lands classified by this order shall not become subject to application under the Small Tract Act of June 1, 1938 (52 Stat. 609; 43 U.S.C. 682a), as amended, until it is so provided by an order to be issued by an authorized officer, opening the lands to application or bid with a preference right to veterans of World War II and of the Korean conflict and other qualified persons entitled to preference under the act of September 27, 1944 (58 Stat. 497; 43 U.S.C. 279-284), as amended.

4. All valid applications filed prior to May 7, 1946 will be granted, as soon as possible, the preference right provided for by 43 CFR 257.5(a). (21 F.R. 6286.)

On February 19, 1959, the manager held the Granit Knowles placer claim invalid insofar as it was in conflict with Mrs. Nightingale's and Lunsford's small tract applications. The Director affirmed, holding that:

² There is some indication in the record that Mrs. Nightingale also filed a relinquishment of her mining claim with the office of the county recorder, but there is also some indication that the land office notified the county recorder of the relinquishment.

In *United States v. Foster et al.*, Contests 2474, 2475 (September 15, 1956), aff'd on other grounds, 65 I.D. 1 (1958), we held that a small tract "offer has a segregative effect since the offeror has an incipient right to a lease if the Secretary of the Interior, within his discretion, decides to issue a lease, and in view of the absence of departmental regulations permitting locations of lands covered by a small tract offer" and that mining claims not perfected prior to the dates of filing of such allowable small tract offers are invalid to the extent of conflict.³

In his appeal, Nichols contends that the doctrine of "relation back" ought not to be applied to the conflict between a small tract application and a later valid mining claim, that public land remains open to mineral location after an application to lease or purchase it as a small tract has been filed and that only a classification of land as suitable for disposition as small tracts will close to mineral location public land otherwise open to it.

The interrelation of the Small Tract Act (43 U.S.C., 1958 ed., sec. 682a *et seq.*) and the mining laws (30 U.S.C., 1958 ed., sec. 21 *et seq.*) has been a matter of some concern to the Department. The proposition on which the Director relies was stated by him in *United States v. Everett Foster et al.*, Contests 2474, 2475 (September 19, 1956),⁴ in a slightly different factual situation. There the mineral location was made first, the small tract application filed next, and the classification followed. The Director held that a mineral locator for a deposit such as sand and gravel must show that the deposit can be extracted, removed, and marketed at a profit before the requirement of discovery is satisfied, that classification of the land as suitable for disposition as small tracts segregates the land from mineral entry, and that classification relates back to the date on which applications were filed under the Small Tract Act. He held that since the mineral locator had failed to show marketability at any time prior to the hearing the claims were invalid.

Upon appeal the Secretary pointed out that the contest was brought before the land was classified, that the claims were invalid because the locators had not established that the deposits could be disposed of at a profit before the land was withdrawn from mineral location for sand and gravel and that, as a result, it was not necessary to reach the Director's holdings as to the effect of a classification and of the

³ The Director also affirmed the manager's rejection of a small tract application for the E $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 27, the tract adjoining Lunsford's application on the latter's eastern boundary, filed on November 26, 1954, by Harry J. Nightingale, the son of Mrs. Nightingale. The manager rejected this application on the ground that it was filed after the placer claim was located. Nightingale has not appealed from the Director's affirmation of the manager's ruling.

⁴ Affirmed *United States v. Everett Foster et al.*, 65 I.D. 1 (1958); *Everett Foster v. Fred A. Seaton*, 271 F. 2d 836 (D.C. Cir. 1959).

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filing of a small tract application. (*United States v. Everett Foster, supra*, 11).

In a recent decision, *Las Vegas Sand and Gravel Co., Inc.*, 67 I.D. 259 (1960), the Department held that after the adoption of a regulation providing that lands classified as suitable for disposition under the Small Tract Act shall be segregated from all appropriation, including locations under the mining laws, mining claims located on lands after they had been classified as suitable for disposition as small tracts are invalid. The Department again found that it was unnecessary to rule upon the proposition that a small tract classification by itself, that is, without the aid of a regulation, removed the lands from the operation of the mining laws.

In the case on appeal, the mineral location was made before the regulation relied on in *Las Vegas Sand and Gravel Co., Inc., supra*, was adopted and there is no contention made that there was no market for the decomposed granite on the claim; consequently it cannot be decided on the basis of either of the cases cited.

I note that the appellant urges that the Secretary's reluctance to base his decision on the conclusions reached by the Director indicates that he is not in agreement with them. This argument makes it desirable to discuss the question of whether a small tract application renders invalid a later mineral location where land in conflict is classified as suitable for disposition as a small tract.

As the Director pointed out, the Department has long followed the general rule that a valid application made under the public land laws is not to be defeated by an adverse intervening right which had an opportunity to arise only as a result of delays in the administrative process for which the applicant was in no way responsible. *Rippy v. Snowden*, 47 L.D. 321 (1920); *Martin J. Plutt et al.*, 61 I.D. 185, 190 (1953); *John F. Silver*, 52 L.D. 499 (1928). The rule has been applied to applications to enter under the Stockraising Homestead Act (43 U.S.C., 1958 ed., sec. 291 *et seq.*), which provides that land covered by a proper application shall not be disposed of until the application is acted on (*Rosetti et al. v. Dougherty*, 50 L.D. 16, 18, 19 (1923); *cf. E. Clark White v. Alfred Roos*, 55 I.D. 605 (1936)), and to those arising under the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 181 *et seq.*), which gives no segregative effect to an offer to lease for oil and gas (*Monolith Portland Cement Co. et al.*, 61 I.D. 43, 48-49 (1952)). In the cases cited it was held or indicated that a mineral location made on land after an application to enter or prospect it had been filed, but before it had been allowed, did not deprive the

applicant of an opportunity to have his application determined without regard to the mineral location.

The only question then is whether this rule should be followed where the first application is one to classify the land as suitable for disposition under the Small Tract Act. The appellant contends that it should not, that to do so would be to wipe out valid mining claims and make uncertain the status of future mining claims.

Before reaching this question, it may be well to examine the circumstances in which a conflict between mining claims and small tracts can arise. To begin with, a mining claim may be made on land leased or patented as a small tract. The Small Tract Act itself provides that the minerals in lands patented as small tracts shall be reserved to the United States and disposed of under regulations prescribed by the Secretary (43 U.S.C., 1958 ed., sec. 682b). As the Secretary has not issued regulations permitting mineral prospecting on lands leased or patented as small tracts, such lands are not open to location under the mining laws. *The Dredge Corporation*, 64 I.D. 368, 373-374 (1957). Next comes a mining claim located on land classified as suitable for disposition as small tract. The Department has provided by regulation that lands classified for disposition as small tracts are not subject to mineral location, 43 CFR, 1959 Supp., 257.3(b), and a mineral location so made is invalid. *Las Vegas Sand and Gravel Co., Inc.*, *supra*. Another situation would be where a mining claim located before the adoption of that regulation conflicts with an earlier classification. The Department has not as yet ruled on this problem. Still another juxtaposition of mining claims and small tracts is one in which a small tract application is filed, then a mineral location made, and thereafter the land is classified as suitable for disposition as a small tract. Finally, there is the possibility that the land office may have been notified that the land is under consideration for small tract classification and then a mining claim is located before the classification is made. There do not appear to be any Departmental decisions in which the last two situations were considered.

The appellant and the Director assumed that the facts in this appeal brought it under the fourth possibility, i.e., where a small tract application is filed, a mining location is made, and thereafter the land is classified as suitable for small tract uses. While, for reasons discussed later, their assumption seems to me to be mistaken, it is necessary to consider whether land in this category is open to mineral location to the exclusion of the small tract applicant.

From the point of view of the latter, it would appear that it should not be. He has done all that is required of him and if the land were classified on the day he filed, a mineral location could not thereafter

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be made on the land he applied for. The delays incident to examination and classification are not traceable to him, for he has nothing to do with these steps but must stand by and await Departmental action. Furthermore, while the Small Tract Act does not give an applicant a preference right, the regulations do give one to an applicant who meets the requirements. 43 CFR, 1959 Supp. 257.5(a). For these reasons a small tract applicant appears to be in the same situation as an oil and gas offeror or a stock raising homestead applicant when a later mineral location conflicts with the land he seeks.

On the other hand the filing of an application for a small tract classification does not segregate the land from other applications for it. The statute is silent upon the effect of an application and the regulation gives a segregative effect only to a classification. 43 CFR, 1959 Supp., 257.3(b). Therefore it cannot be held that the land is not open to other entries under the public land law.

However, the fact that the land is open to other entry does not mean that such entries can displace the small tract applicant who can do nothing to protect his interests. If the disposition of public lands as small tracts were to deprive the United States of the minerals in the land, there would be some reason for applying the rule used in the case of homestead and other entries that an entry will be canceled if the land it covers is determined to be mineral at any time before the entryman has complied with all the requirements of the law and regulations. *Cleveland Johnson (On Rehearing)*, 48 L.D. 18, 19 (1921). But here, as in a stock-raising homestead entry, where the minerals are also reserved to the United States, the United States will retain its rights to the minerals even after the small tract application is allowed.

Besides the mineral reservation, the United States has another opportunity to protect its interest against a small tract application. Before such an application earns any rights in the land it describes, the Secretary must classify the land as suitable for disposition as a small tract. The classification is committed to the Secretary's discretion and he may consider all relevant factors in reaching his decision. He is, of course, not bound by the fact that a small tract application may be first in time, if he determines that the land is not suitable for small tracts or more valuable for other uses. *Lawrence C. Roberts*, A-28167 (February 2, 1960). Certainly one of the other uses he may take into account is the mineral value of the land and if he decides that the land is more valuable for mineral than for small tract purposes, he will refuse to classify the land for the latter. *Id.*

For these reasons I conclude that the doctrine of relation applies to a small tract applicant as well as to other applicants and that a later mineral location will not require the rejection of the small tract application.

However, a mineral locator is not precluded from initiating his claim to some land merely because it is covered by a prior small tract application. Since the small tract application is a matter of record, a later mineral locator can always ascertain whether or not a small tract application conflicts with his location. If it does, he can protest against the classification of the land as chiefly valuable for small tract purposes. If despite a mineral claimant's efforts, the Secretary decides that the land is more valuable for small tract purposes than for mineral location or other uses, then the mineral claim becomes invalid. If the classification is denied, then the mining claim is valid. *Cf. C. Clark White v. Alfred Roos, supra.*

While this subordinate position does not place the mineral locator in as advantageous a position as he held in competition with other incomplete entries, such as a homestead, it cannot fairly be said to impose a serious burden on him. If land is more valuable for small tract use than mining, the minerals in the land cannot be of really substantial value and the land is best devoted to its higher use.

In summary then a mineral location made after a small tract application has been filed for the same land is not invalid per se, and the locator can protest against the classification of the land for small tract purposes, but if the land is classified for disposition as a small tract, the mining claim must then be held invalid.

This conclusion, however, does not dispose of the case on appeal because there is in it an additional factor which was absent in the situation just analyzed. Here the first step in the process of classifying the land for small tract was not taken by the appellant, but by the Department itself. The record indicates that at the time Mrs. Nightingale first filed her application the land was already under consideration for classification for small tract purposes. The classification order (*supra*) states that only applications filed prior to May 7, 1946, shall be granted any preference right. Since at the time Mrs. Nightingale and Lunsford filed their applications the regulation, 43 CFR, 1953 Supp., 257.6(a), awarded a preference right only to applications filed prior to the receipt by the manager of notice that an area is under consideration for small tract purposes, it is plain that the date set out in the classification order is the date for cutting off preference right applications.

Apparently it was the awareness of this fact which led Mrs. Nightingale to amend her application to cover other land so that her son-

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in-law could file on the 5 acres including the improvements, since Mrs. Nightingale had no preferences at all while Lunsford, as a veteran, could at least qualify, along with any other veteran who timely filed, for the veteran's preference right, referred to in paragraph 2 of the classification order.

We must now consider whether the conclusion reached in discussing the conflict between a mining claim and a prior preference right small tract application is pertinent to these facts. It is my opinion that it is not.

First, the fact that land is under consideration for small tract classification does not segregate it from appropriation under the mining laws. Only classification does. 43 CFR, 1959 Supp., 257.3(b). Next, in these circumstances there are no applicants whose expectations are jeopardized by delays which they cannot prevent nor is there any question of a preference right. Finally, there is no entry on the tract book to notify a mineral locator of a prior application for the land.

The only possible obstacle to a mineral location is the fact that the Department is considering classifying the land for small tract purposes. If the Department desires to protect lands in this status from mineral location or other appropriation it can do so by providing by regulation that the tract book be noted and that the land be segregated or that all later actions affecting the land will be subject to the possibility that the land may be classified for small tract purposes. This is the procedure the Department follows in protecting lands which agencies of the United States desire to be withdrawn prior to the actual withdrawal. 43 CFR, 1959 Supp., 295.9 *et seq.*; *Marion Q. Kaiser et al.*, 65 I.D. 485 (1958). However, no regulation has been adopted for this purpose.

For these reasons I believe that the fact that the Department is considering classification of a tract of land is not sufficient reason to hold that the land is not open to mineral location.

The next question, and the actual one involved in this appeal, is whether the fact that a small tract application is filed after the land office has been notified that the land is under consideration for classification as small tracts but before a mineral location is made leads to a different result. Again I believe that it does not.

As we have noted, an offeror in this situation earns no preference right. Even more important the regulation in effect when the appellants filed provided that

the offer will be retained by the manager pending classification of the land. If the land is classified for disposal under the act, the offer will be considered

as a filing during an applicable period for simultaneous filings * * *. 43 CFR, 1953 Supp., 257.6(a)⁵

In other words, the offer was considered as filed after the land had been classified. In such circumstances there is no reason to apply any doctrine of relation for none of the reasons which support it is pertinent; the offeror does not have a pending offer on file, administrative delays can not affect him, nor has he been instrumental in having the land classified. In fact, the regulation then in effect also provided that if there was more than one applicant the successful one was to be chosen by lot. 43 CFR, 1953 Supp., 257.8.⁶ This procedure, of course, could result in the award of a lease to an applicant who did not file an application until after the land had been classified, so that there would be no occasion to apply a benefit that could attach, if at all, only to the offer of an earlier but unsuccessful applicant. See *E. Clark White v. Alford Roos, supra*. Since all the participants in a drawing stood on an equal footing and their offers were all treated as having been simultaneously filed after the land had been classified, there was no date prior to the date of classification to which the offer could be related back.

Accordingly, it is concluded that the land covered by Mrs. Nightingale's and Lunsford's small tract applications were not closed to mineral location by reason of their small tract offers or the subsequent classification, and that it was incorrect to reject the mineral application to the extent that it conflicted with those offers.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director is reversed.

EDWARD W. FISHER,
Deputy Solicitor.

J. G. HATHEWAY ET AL.

A-27368, A-27523 *Decided February 28, 1961*

Oil and Gas Leases: Consent of Agency—Oil and Gas Leases: Lands Subject to

Where the Secretary of Defense determines upon consultation with the Secretary of the Interior, pursuant to section 6 of the act of February 28, 1958, that mineral exploration of a military reservation is inconsistent with the military use of the lands, offers to lease such lands for oil and gas must be rejected.

⁵ Under the regulation now in effect, such offers are rejected. 43 CFR, 1959 Supp., 257.6(e) (4) (iii).

⁶ Now 43 CFR, 1959 Supp., 257.7.

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Oil and Gas Leases: Applications

Where an offer to lease lands cannot be accepted because the lands are not available for leasing, the offer will be rejected and not held in suspense until the land may become available for leasing.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

J. G. Hatheway and six other individuals¹ have appealed to the Secretary of the Interior from a decision dated April 10, 1956, of the Director of the Bureau of Land Management which affirmed the decision of the manager of the Los Angeles land office rejecting their non-competitive offers (Los Angeles 089439 through 089445) to lease for oil and gas certain lands on San Nicolas Island off the southern coast of California.

Reginald Clark, John J. Turner and Jonah Jones, Jr.,² have also appealed to the Secretary from a decision dated June 5, 1957, of the Director of the Bureau of Land Management which affirmed the action of the manager of the Los Angeles land office rejecting their offers³ to lease for oil and gas certain lands on San Miguel Island and ancillary islets.

Since the facts and the law under which the two groups of appeals are to be disposed of are similar, they may be considered together.

First, San Nicolas Island is under the control and jurisdiction of the Secretary of the Navy for naval purposes pursuant to Executive Order 6009 of January 31, 1933. The manager rejected the offers on the ground that the Navy Department had advised him that the military use of the island prohibited its consideration for oil and gas leasing. On appeal, the Director affirmed, stating that the Navy Department persisted in its objections to the issuance of leases and had advised him that it intended to investigate the oil bearing possibilities of the area itself and, if they were favorable, to drill and possibly have the area set aside as a naval petroleum reserve.

¹ The appellants and their lease offers are as follows:

J. G. Hatheway-----	Los Angeles 089439
D. R. MacPherson-----	Los Angeles 089440
W. R. Pagen-----	Los Angeles 089441
C. L. Cameron-----	Los Angeles 089442
Gaye Bjornsen-----	Los Angeles 089443
John P. Hurndall-----	Los Angeles 089444
R. J. Kerr-----	Los Angeles 089445

² The appellants and their lease offers are as follows:

Reginald Clark & Jonah Jones, Jr.-----	Los Angeles 0121558
John J. Turner & Jonah Jones, Jr.-----	Los Angeles 0127413
	Los Angeles 0127414
	Los Angeles 0127415
	Los Angeles 0127416

³ See footnote 2.

Turning now to the other group of offers, it appears that San Miguel Island was transferred to the control and jurisdiction of the Navy Department for naval purposes by Executive Order 6896, dated November 7, 1934. The manager rejected the offers on the ground that the Navy Department did not wish oil or gas leasing on the island. On appeal, the Director affirmed the manager on the ground that this Department would not lease lands administered by another agency without the consent of that agency.

In their appeals to the Secretary, the appellants raised several objections to the Director's decision. For the reasons stated below, these arguments, except for one, are now moot.

Some aspects of the reservation of public lands for military purposes and the disposition of minerals, including oil and gas, on public lands withdrawn or reserved for the use of an agency of the Department of Defense were considered by the Congress in connection with a bill, H.R. 5538, 85th Congress, 1st session. This bill was approved on February 28, 1958 (72 Stat. 27).

Section 6 of the act (43 U.S.C., 1958 ed., sec. 158), which states that the oil and gas deposits on military reservations are under the jurisdiction of the Secretary of the Interior and shall be disposed of only under the mineral leasing laws, contains this proviso:

That no disposition of, or exploration for, any minerals in such lands shall be made where the Secretary of Defense, after consultation with the Secretary of the Interior, determines that such disposition or exploration is inconsistent with the military use of the lands so withdrawn or reserved.

In accordance with the terms of the act, the Secretary of the Interior solicited the views of the Secretary of Defense with respect to the issuance of oil and gas leases on San Nicolas and San Miguel Islands.

The Acting Secretary of Defense in a letter dated October 4, 1958, stated:

Subsequent to your discussion with a representative of this office, the military requirements with respect to San Nicolas and San Miguel Islands have been reviewed again, and it has been determined that issuance of oil and gas leases on these Islands, which form an integral part of the Pacific Missile Range, would be inconsistent with their present and planned military use.

Several months later the General Counsel for the Department of Defense in a letter dated January 28, 1959, to Senator Engle, explaining in greater detail the factors involved in that Department's conclusion, said:

* * * San Nicolas Island is an integral part of the Pacific Missile Range. Operationally, the Navy conducts extensive electronically controlled drone

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flight and recovery operations utilizing an air strip on the Island. The Island provides telemetry and data processing instrumentation associated with the flight of missiles and satellite vehicles generated by tri-service operations utilizing the Pacific Missile Range. The presence of commercial activities utilizing large electric power sources in drilling and pumping operations would seriously impede the military mission through emissions of electromagnetic interference. The Island as an operational location for placement of sensitive radar and data recording and drone control operations devices was selected because of its remote location. The installation at San Nicolas has been designated along with other components of the Pacific Missile Range as a maximum security area by direction of the President.

The Bureau of Ships has installed facilities on the Island in connection with a highly classified electronics project. The nature of the instrumentation employed is such that it is extremely sensitive to electro-magnetic emissions from large power sources. A remote location, such as San Nicolas Island, and engineering of a separate power system to meet the needs of the project, was necessary to insure project success. In addition to electro-magnetic interference, experience has shown that research of the type being conducted by the Bureau of Ships is seriously hampered by the earthborne low frequency mechanical interference of a seismic nature incident to drilling, pumping and other associated mining activities in geographical proximity.

In addition areas suitable for siting troop housing, messing, and industrial type facilities are either presently occupied or planned for development as Pacific Missile Range and Navy programs expand. Construction of facilities supporting commercial oil and gas exploration would impede military development of the Island area.

In view of the determination by the Secretary of Defense, no disposition of the oil and gas deposits can be made and the appellants' offers to lease for oil and gas must be rejected.

There remains the appellants' contention that even if their offers are not to be accepted now, they ought not to be rejected but should be continued as pending offers which would be entitled to priority at any time in the future that the lands might become available for leasing. As the appellants recognize, the Department has long followed the policy, as to applications for mineral leases and other interests in public lands, of rejecting all applications for lands which are not available for requested disposition at the time they are filed or considered. *Noel Teuscher et al.*, 62 I.D. 210 (1955); *D. Miller*, 60 I.D. 161 (1948). This rule has been followed whether the lands applied for were unavailable because of a statute,⁴ a withdrawal,⁵ a temporary disposition,⁶ or the exercise of the Secretary's discretion.⁷

⁴ *Noel Teuscher et al.*, 62 I.D. 210, 214 (1955).

⁵ *Mary E. Brown*, 62 I.D. 107 (1955).

⁶ *R. B. Whitaker et al.*, 63 I.D. 124 (1956).

⁷ *Grace F. Holbeck*, A-27357 (August 20, 1956).

However, the appellants urge that the rule ought not to be followed where the only reason that a lease is refused is because the Secretary in the exercise of his discretion decides not to issue one. In the first place, the proviso to section 6 (*supra*) removes the issuance of oil and gas leases from the sole discretion of the Secretary by stating that he can issue a lease only if the Secretary of Defense makes the determination that it is not inconsistent with the military use of the withdrawn or reserved land.

In the second place, the rule is founded upon sound administrative practice. It prevents the public land records from being burdened with thousands of applications on which there is no possibility that action can be taken in the foreseeable future. If one person can maintain an application for land not available for leasing, several or even a hundred can.⁸

In view of the hundreds of thousands of acres of public land which are not available for leasing for one reason or another, it is plain that the problem of administering premature offers would be considerable. Furthermore, it would permit persons whose funds are ample and who could afford to wait to acquire an option on future leasing of an area.

An even more stringent application of the same rule, that land which has been segregated from the public domain by patent, entry, selection, reservation or otherwise does not become available for other disposition until its restoration to the public domain has been noted on the tract books and that an application filed in the interval between cancellation and notation will be rejected, has long been followed by the Department and received the approval of the courts. *Hiram M. Hamilton*, 38 L.D. 597 (1910); *California and Oregon Land Co. v. Hulen and Hunnicutt*, 46 L.D. 55 (1917); *Germania Iron Co. v. James*, 89 Fed. 811 (1898); *Holt v. Murphy*, 207 U.S. 407, 415 (1908).

Accordingly, the Department will adhere to the rule that offers to lease for oil and gas embracing lands which are not available for leasing will be rejected and not suspended pending the availability of the land for leasing.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental

⁸ It is not unusual for several hundred applicants to file simultaneous applications for land which is opened to leasing for some reason. See *McKay v. Wahlenmaier*, 223 F. 2d 35 (1955), where over 800 simultaneous applications were filed.

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Manual; 24 F.R. 1348), the decisions of the Director of the Bureau of Land Management are affirmed.

EDWARD W. FISHER,
Deputy Solicitor.

STATE OF UTAH

A-28595*Decided March 2, 1961*

School Lands: Indemnity Selections

The right of a State to Select public land as indemnity for losses in a fractional township of specific sections named in a grant of school lands to the State is measured by the acreage to which it is entitled computed in accordance with R.S. 2276, as amended, less the acreage of the school lands in place in the fractional township.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The State of Utah has appealed to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management dated July 15, 1960, affirming decisions of the land office at Salt Lake City, Utah, dated October 28, 1959, rejecting its school indemnity selections proffered because of deficiencies resulting from fractional townships. The rejections were predicated upon the conclusion that the acreages of the selected lands are in excess of the State's entitlement under the statutory provisions for indemnity for deficiencies in school land grants to the States.

The State of Utah is entitled under section 6 of the enabling act of July 16, 1894 (28 Stat. 107, 109), to four sections of public land (numbered 2, 16, 32 and 36) in every township of the State for the support of common schools. Section 2275 of the Revised Statutes, as amended on August 27, 1958 (43 U.S.C., 1958 ed., sec. 851), appropriates additional land to be selected by States and Territories as compensation or indemnity for school sections lost to them because of prior appropriation through settlement or inclusion in a reservation. This section also provides:

And other lands of equal acreage are also hereby appropriated and granted, and may be selected, in accordance with the provisions of section 2276 of the Revised Statutes, by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever.

Revised Statutes sec. 2276(b) provides that:

Where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section, and not more than one-quarter of a township, one-quarter section of land: * * * (43 U.S.C., 1958 ed., sec. 852(b).)

On August 12, 1959, the State of Utah filed its State indemnity selection list No. 2950, which was designated in the land office as Utah 037021. This list included 583.40 acres of land as indemnity for natural deficiencies in T. 15½ S., R. 23 E., and T. 15½ S., R. 24 E., Salt Lake Meridian. On July 17, 1959, the State filed state indemnity selection list No. 2935, which was designated as Utah 036501. This list included 640 acres as indemnity for natural deficiencies in T. 3 N., R. 15 E., and T. 3 N., R. 16 E., Salt Lake Meridian.

The land office decisions of October 28, 1959, noted that the acreages shown by the official plats of survey of the townships in which deficiencies entitling the State to indemnity exist are as follows:

T. 15½ S., R. 24 E., SLM	2,709.04 acres
T. 15½ S., R. 24 E., SLM	2,701.65 acres
T. 3 N., R. 15 E., SLM	14,181.08 acres
T. 3 N., R. 16 E., SLM	13,662.83 acres

Because a township of 36 sections of 640 acres each contains 23,040 acres, it is apparent that as to the first two fractional townships listed above the acreage is more than one entire section and not more than one-quarter of a township. As to the last two fractional townships listed above, the acreage is a quantity of land greater than one-half, and not more than three-quarters of a township.

The land office decisions set out the entitlement of the State in these circumstances as follows:

Location	State acreage entitlement	Acreage of school sections in place	Acreage of indemnity rights
T. 15½ S., R. 23 E.	640	907.12	0
T. 15½ S., R. 24 E.	640	783.59	0
T. 3 N., 15 E.	1920	1640.12	279.88
T. 3 N., 16 E.	1920	1733.80	186.20

The land office thus determined the acreage of indemnity which the State of Utah may select in the fractional townships under consideration by deducting from the entitlement indicated in the selection

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formula set out in the statute the acreage of school land in place in the townships title to which vested in the State under the school land grant at the time of survey.

In its appeal, the State of Utah contends that it should be allowed to select as indemnity the maximum acreage permitted under the statute without regard to the amount by which a fractional township is actually deficient in state school lands. The State is thus contending that it is entitled to select 4 sections of land for a fractional township containing more than three-quarters of a normal township even though most or even all of the 4 sections named in the school grant may be complete and owned by the State under the school grant.¹

It is clear that the selection formula set out in Revised Statutes sec. 2276(b) is to be utilized by States and Territories only for selections "to compensate for deficiencies of school lands in fractional townships." It follows, then, that the extent of a selection right in a given case is limited to the amount of the deficiency in school lands for which indemnity is sought. In any event, section 2276(b) is not the source of the authority of the States to make selections. It merely specifies the formula to be used "[w]here" selections are to be made to compensate for deficiencies in school lands in fractional townships. The grant of authority to select in these circumstances is made in section 2275. That section clearly indicates that the land made available for indemnity selection is limited to an acreage equal to the deficiencies in land previously granted for school purposes for which indemnity is sought.

The Department has long followed this method of computing the acreage to which a state is entitled as a result of a deficiency of school land in a fractional township. *Munro et al. v. State of Washington*, 28 L.D. 366, 368 (1899); ² *State of Oregon*, 32 L.D. 183 (1903; *State*

¹ The State contends that the Congress must have intended to permit a State to select as much as 4 sections of land in the case of a fractional township containing only a little more than three-fourth of the acreage of a normal township because it could not be possible for a township to have so much acreage without containing some of the 4 school sections. This argument overlooks the fact that the formula was written to define the selection rights of States entitled to but one section per township of school land. It also overlooks the fact that a fractional township no more than three-fourths complete could include all of the 4 sections designated in the Utah school land grant.

² The Secretary computed the acreage due the State as indemnity for school lands in a fractional township as follows:

"Upon the survey of this township it was found to be fractional, containing only 12,190.55 acres. Under the adjustment provided for in section 2276 of the Revised Statutes, as the township contained a greater quantity of land than one-half and not more than three-fourths, of a township, the State became entitled on account of said township to nine hundred and sixty acres for the benefit of the common schools.

"Selections have been made by the State for all deficiencies in this township, aggregating six hundred and eighty acres, six hundred and forty acres of which have been

of Idaho, 37 L.D. 430, 434 (1909). The method of computation seems to have been accepted by the States without question for all these years.

The State's position leads to the absurdity that even though the 4 school sections in place in each of two townships may be intact and pass to the State, it is entitled to select an additional 4 sections in one of the townships because it is a few acres undersized whereas it must be content with the 4 sections in place in the other township because it is regular in size. There is nothing in the statute which requires such a curious result.

Hence I conclude that the Secretary of the Interior is without authority to accept any school indemnity selections which are in excess of the loss actually sustained by the State and that the Director's decision was clearly right.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management is affirmed.

EDWARD W. FISHER,
Deputy Solicitor.

APPEAL OF MANNIX INTERNATIONAL, INC.

IBCA-269

Decided March 7, 1961

Contracts: Appeals—Rules of Practice: Appeals: Dismissal

Where a contractor who has filed a notice of appeal requests that the appeal be held in abeyance while attempts are being made to settle the controversy by negotiation, the appeal will be dismissed, but without prejudice to its subsequent reinstatement in the event the controversy is not so settled.

BOARD OF CONTRACT APPEALS

Mannix International, Inc., of Calgary, Alberta, Canada, has filed a notice of appeal, dated January 31, 1961, from a decision of the Chief Engineer of The Alaska Railroad, dated December 28, 1960.

Counsel for the appellant in a letter to the Chief Engineer dated February 7, 1961, states that "inasmuch as we are now in the process of

approved, leaving a selection of forty acres yet undetermined, which, together with the 270.50 acres, the portions of section 16 in place shown by the survey to be free from other claims and embraced in the applications now under consideration, make a total of 950.50 acres, or 9.50 acres less than the State became entitled to for common schools on account of said township."

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attempting to negotiate a complete settlement regarding this matter, it is my request that said appeal be held in abeyance with no further action until such time as we either complete our negotiations or determine the matter cannot be negotiated."

The Acting Chief Engineer of The Alaska Railroad in a letter dated February 9, 1961, makes the following comment with respect to this request:

The attorney for Mannix International, Inc. has indicated that he may withdraw the appeal depending upon the outcome of discussion on settlement of another contract. He does not wish, however, to be precluded from having time in which to submit a brief for Mannix on the present appeal should it not be withdrawn.

Where requests such as this are received, it is the practice of the Board to dismiss the appeal, but without prejudice to its subsequent reinstatement. Such practice eliminates the necessity for holding appeals on the docket in a suspense category over indefinite periods of time.

Order

The appeal of Mannix International, Inc., under Contract No. 14-04-003-908, is hereby dismissed. Such dismissal is without prejudice to the subsequent reinstatement of the appeal in the event the controversy is not settled through negotiation. In that event a new notice of appeal should be filed with the contracting officer for transmittal to the Board. If appellant desires to file a brief pursuant to 43 CFR 4.5, such brief should be submitted simultaneously with the new notice of appeal.

HERBERT J. SLAUGHTER, *Member.*

I concur:

PAUL H. GANTT, *Chairman.*

APPEAL OF LEE MOULDING, d/b/a LEE MOULDING CONSTRUCTION CO.

IBCA-153

Decided March 13, 1961

Contracts: Payments

Under a contract for the placement of a gravel blank overlain by riprap which provides that measurement for payment is to be made "to the neat lines and grades shown on the drawings or prescribed by the contracting officer," or "on the basis of the nominal thickness shown on the drawings or prescribed

by the contracting officer," gravel or riprap placed outside of the lines shown on the drawings is not to be measured for payment in the absence of satisfactory proof that an authorized representative of the contracting officer required the contractor to place the material to a greater thickness than shown on the drawings.

Contracts: Changes and Extras—Contracts: Interpretation—Contracts: Performance

Under a contract for the placement of a gravel blanket overlain by riprap, the contractor is not entitled to additional compensation for (a) removing spalls, gravel, dirt and vegetative matter from riprap that in its natural state, as ascertainable by a reasonable site investigation, contains more of such extraneous material than is permissible under a proper interpretation of the specifications, even though the riprap is taken from sources that are described in the specifications as containing rock "suitable for riprap," or (b) complying with instructions as to the procedures to be used in placing and smoothing riprap, given by an authorized representative of the contracting officer, in the absence of satisfactory proof that the results called for by the specifications could have been achieved at less expense through the use of other procedures.

Contracts: Payments—Contracts: Performance

Under a contract for the building of a road, the contractor is entitled to compensation for excavating unstable natural material where the Government fails to prove its defense that payment for such work had been made, but is not entitled to compensation for excavating unstable material in an embankment he had constructed where the evidence disproves his contention that the Government inspectors caused the material to be unstable by requiring him to wet it too much.

Contracts: Protests

The protests clause customarily inserted in Bureau of Reclamation construction contracts does not apply to a ruling that is communicated to the contractor for the first time in a decision made under the "Disputes" clause of the contract, and from which a timely appeal is taken.

Contracts: Damages: Liquidated Damages—Contracts: Release—Contracts: Unforeseeable Causes

Claims for remission of liquidated damages on account of delays in completing a contract are not allowable if based on (a) weather conditions that were not unusually severe for the locality and season involved, (b) circumstances not within the scope of the claim as described in an exception to the release on contract, or (c) failure of the delays to cause actual loss to the Government if there was a reasonable possibility of such loss when the contract was made.

BOARD OF CONTRACT APPEALS

Lee Moulding, d/b/a Lee Moulding Construction Co., of Roy, Utah, has filed timely appeals from three decisions of the contracting officer under Contract No. 14-06-400-526, dated August 17, 1956, with the Bureau of Reclamation.

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The contract in question provided for the construction of shore protection works at Huntsville Cemetery and for the relocation of the approach road leading to the cemetery, as incidents to the enlargement of Pineview Reservoir of the Weber Basin Project, Utah. It was on U.S. Standard Form 23 (Revised March 1953) and incorporated the General Provisions of U.S. Standard Form 23A (March 1953). The various items of work were to be paid for at unit prices, estimated as aggregating \$68,786.

In one of the decisions appealed from, dated January 30, 1958, the contracting officer denied in their entirety six claims for additional compensation. In the other decisions, dated respectively January 30, 1958, and March 28, 1958, the contracting officer allowed in part and denied in part a claim for extensions of time and remission of liquidated damages. The total monetary value of the claims so denied is \$27,240.06.

Each of the contracting officer's disallowances was based on the grounds that (1) the appellant had not complied with the applicable protest or notice provisions of the contract, and (2) the claim being disallowed was without substantive merit. The conclusions which the Board has reached with respect to the second of these grounds make examination of the first unnecessary, except in connection with Claim No. 4.

To facilitate analysis of the issues presented, the claims will be considered in an order differing from that in which they are numbered.

Shore Protection Works

Construction of the shore protection works provided for in the contract required three stages. The first was the shaping of the shore to smoothly sloping contours by excavating high spots and filling low spots. The upper part of the shore, called the "slope," was to be shaped to a gradient ranging, at most places, between $1\frac{1}{2}$ to 1 and 2 to 1. The lower part of the shore, called the "apron," was to be shaped to a considerably flatter gradient. The second stage was the placing of a gravel blanket upon the shore. This blanket was to be 6 inches thick on the slope and 12 inches thick on the apron. The third step was the placing of a layer of riprap on top of the gravel blanket. The riprap was to be 24 inches thick, and was to cover the entire slope, but not the apron.¹

¹ The dimensions here given for the thickness of the gravel and the riprap are those contained in a revised drawing which was transmitted to appellant on October 11, 1956. The differences between these dimensions and those shown on the drawing before its revision are not an issue in this appeal.

Four of the six claims for additional compensation relate to the shore protection works, Claim No. 2 being concerned with the gravel blanket, while Claims Nos. 1, 3 and 6 have to do with the riprap. The provisions of the contract that appear to have particular pertinency with respect to these four claims are as follows:

Unless otherwise specifically provided for in the specifications, all equipment, materials, and articles incorporated in the work covered by this contract are to be new and of the most suitable grade of their respective kinds for the purpose and all workmanship shall be first class. * * * (Clause 8 of the General Provisions)

Bidders are invited to visit the site of the work and by their own investigations satisfy themselves as to the existing conditions affecting the work to be done under these specifications. If the bidder chooses not to visit the site he will nevertheless be charged with knowledge of conditions which a reasonable inspection would have disclosed. Bidders and the contractor shall assume all responsibility for deductions and conclusions as to the difficulties in performing the work. (Paragraph 21A of the specifications)

The Government will establish a stationed centerline, bench marks, and principal control points for commencement of the work. The Government will also take cross sections of the original ground surface at the site of the work and at borrow areas and will make final surveys of the completed work. The Government will set one set of cut stakes for the protective work around the cemetery. The contractor will be required to set cut and fill stakes for the road relocation. All other surveys and layout of the work shall be performed by the contractor. * * * (Paragraph 27(a) of the specifications)

* * * Surveys of the completed work will be made by the Government for the final estimate. The final payment quantities will be based on the Government's original cross sections and the final surveys, and to the lines shown on the drawings or prescribed in these specifications. * * * (Paragraph 27(c) of the specifications)

A gravel blanket shall be placed as shown on the drawings or as directed by the contracting officer. * * * (Paragraph 35(a) of the specifications)

Measurement for payment of gravel blankets will be made of the blanket material in place to the neat lines and grades shown on the drawings or prescribed by the contracting officer. * * * (Paragraph 35(b) of the specifications)

The contractor shall place riprap on the reservoir slopes where shown on the drawings and, elsewhere, as directed by the contracting officer. (Paragraph 36(a) of the specifications)

The riprap shall be placed to the prescribed lines, grades, and thicknesses. The rock used shall be hard, dense, and durable. Either quarried rock or boulders may be used. The rock shall range in volume from a maximum of $\frac{1}{2}$ cubic yard to a minimum of $\frac{1}{2}$ cubic foot. The rock in riprap need not be hand-placed, but shall be dumped and smoothed in such a manner as to insure that the completed riprap is stable, without tendency to slide, and so that there will be no unreasonably large unfilled spaces within the riprap. The inclusion of rock spalls or gravel in the mass in an amount not in excess of that required to fill voids in the material, as determined by the contracting officer, will be permissible.

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The selection of the riprap borrow area shall be made by the contractor subject to the approval of the contracting officer. The contractor shall obtain permission from the owners prior to removal of riprap. Rock, suitable for riprap, is located along Wheeler Creek about 0.3 miles above its confluence with the Ogden River, for a haul distance of about 6.4 miles and along the South Fork of Ogden River about 6.3 miles east of Huntsville, Utah, for a haul distance of about 7.6 miles and at other locations. (Paragraph 36(b) of the specifications)

Measurement, for payment, of riprap will be made of the outlines of the riprap in place and on the basis of the nominal thickness shown on the drawings or prescribed by the contracting officer. * * * (Paragraph 36(c) of the specifications)

Claim No. 2: Measurement of Gravel

This claim is for the sum of \$4,322.50 on account of alleged mis-measurement of the gravel blanket. Payment at the contract unit price was made for the placement of 4,500 cubic yards of gravel blanket as a part of the shore protection works. Appellant asserts that the quantity actually placed was 6,970 cubic yards, or about 55% more than the quantity for which payment was made. The claim is for payment of the contract unit price with respect to this difference in quantities.

While the gravel was being dumped and spread there were frequent discussions of its thickness between appellant and the Government's inspectors. The inspectors would measure the thickness of the blanket by digging holes through it to the underlying soil and by placing a ruler in these holes. When they considered that the blanket at a particular spot was thinner than the contract prescribed, they would tell appellant to add more gravel at that spot. When they considered that the blanket was thicker than prescribed they would frequently—although probably not invariably—call this circumstance to appellant's attention, but would leave him the option of either removing the excess gravel or permitting it to remain in place.

Appellant contends that the ruler measurements were haphazard and inaccurate. He asserts, in particular, that due to similarities between the gravel and the underlying soil, the inspectors often failed to get the ruler down to the true bottom of the blanket. These contentions are not adequately proven. On the contrary, the weight of the evidence is to the effect that the underlying soil was composed of fine-grained sandy or loamy material quite unlike gravel, and that the inspectors' measurements by ruler were substantially correct.

One point on which appellant places much stress is the fact that his figure of 6,970 cubic yards is based on truck measurements of the gravel that were made by the subcontractor who hauled it to the site of the work, and that appear to have been checked with considerable regularity by the inspectors. These truck measurements were

admitted in evidence on the basis of an affidavit as to their accuracy executed by the subcontractor. This affidavit states that the subcontractor was hired to haul gravel not only for the shore protection works, but also for the relocation of the approach road to the cemetery. It contains no averment that the truck measurements certified to therein are confined to gravel for the shore protection works. If they also include gravel for the blanket that was placed along the side of the road embankment, the ratio by which the truck measurements exceed the quantities actually paid for would be reduced to about 40%. If, in addition, they also include gravel for construction of the roadway itself, the differential between the truck measurements and the pay quantities would be still further reduced, in an amount that cannot be determined accurately from the record. The ambiguities of the affidavit in these respects must be resolved against appellant, since he was the party who introduced it. The subcontractor was not called as a witness, and, hence, the Government did not have an opportunity to cross-examine him concerning the derivation or content of the figure of 6,970 cubic yards.

On the basis of the evidence as a whole, we find that the inspectors did not require appellant to place more than 6 inches of gravel on the slope, or more than 12 inches of gravel on the apron, and that the excesses above these dimensions which occurred at some locations were due to the manner in which the gravel was placed by appellant, rather than to any instructions or directions of Government personnel.

This brings us to the question of whether such excesses should have been measured for payment. The Government computed the pay quantities of gravel blanket by measuring the linear extent of the slope and apron areas covered by the blanket and by multiplying the square yardage of these areas by the prescribed thickness of the blanket, that is, 6 inches for the slope and 12 inches for the apron. This method of computation necessarily excluded from the pay quantities any amounts by which the actual thickness was greater than the prescribed thickness, and, incidentally, treated as pay quantities any amounts by which the actual thickness may have been less than the prescribed thickness. Appellant contends that the pay quantities should have been determined by taking cross-sections of the underlying soil before the blanket was placed and cross-sections of the blanket after it had been completed, and by using the difference between these two sets of cross-sections as the basis for payment. Under this procedure any excesses or deficiencies in thickness would necessarily have been reflected in the pay quantities.

The Board considers that the Government's method of computation was the right one. Had the contracting officer, either in person or

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through an authorized representative, exercised the authority conferred on him by Paragraphs 35 (a) and (b) of the specifications to direct that more blanket material be placed than the contract drawings specified, cross-sections might well have been necessary. However, as we have found, no such direction was actually issued by the contracting officer or any of the other Government personnel concerned with this job. This being so, measurement for payment was governed by the clause in Paragraph 35(b) requiring such measurement to be "to the neat lines and grades shown on the drawings." This specific requirement for measurement of the gravel blanket cannot be construed as negated by the general language with respect to cross-sections in Paragraphs 27 (a) and (c). Particularly is this so in view of the express indication in the latter paragraph that measurement "to the lines shown on the drawings" is one of the criteria that is to be used for the determination of pay quantities.

It is quite common in unit price contracts to provide that payment shall be made on the basis of the quantities included within the dimensions shown on the drawings or mentioned in the specifications, rather than on the basis of the quantities actually excavated, hauled, placed, or otherwise processed by the contractor. Paragraph 35(b) clearly is just such a provision, and, in the absence of any directions to appellant that the contract dimensions be exceeded, cross-sections would have been neither a necessary nor an appropriate method for computing payment.²

Claim No. 2, therefore, is denied.

Claim No. 6: Cleaning of Riprap

This claim is for the sum of \$10,000.00 on account of alleged excessive cleaning requirements imposed by the inspectors.

A good deal of the rock used for riprap was intermingled in its natural state with considerable quantities of rock spalls, gravel, dirt, and vegetative matter. Appellant removed at the source some of this intermingled material by using a loading bucket that had openings in its bottom, and by trucking to the shore only what was left of the contents of the bucket after it had been well shaken. At the shore more of the small material was removed by dumping the contents of the trucks on level ground immediately above the top of the

² Payment on the basis of cross-sections was made for a number of cubic yards of gravel that appellant placed in order to fill gaps caused by a slide, but in that case the repair of the slide was evidently considered by the contracting officer as being outside appellant's responsibilities under the contract. If the repair of the slide was not required by the contract, then the instructions given appellant to fill the gaps were a direction to place more gravel than was shown on the contract drawings, and entitled appellant to have measured for payment the actual quantities placed in response to such instructions.

slope, and by selecting only the larger material for placement on the slope. Both of these cleaning procedures were adopted by appellant for the purpose of obtaining riprap that was sufficiently free from rock spalls, gravel, dirt, and vegetative matter to be acceptable to the inspectors. That is to say, the inspectors did not instruct appellant to adopt either procedure, but, after they had made known to appellant what sort of rock they would be willing to pass, appellant determined that use of the procedures in question would be the best way of providing such rock.

Appellant contends that the inspectors' concepts of acceptable rock were far stricter than the contract justified, and that much of the cleaning work was unnecessary in order to produce riprap which would meet the specifications.

The governing requirements of the contract appear in Clause 8 of the General Provisions and in Paragraph 36(b) of the specifications, and, most specifically, in the first subparagraph of that paragraph. We construe them as meaning that the riprap is to consist of a stable mass of rocks, ranging in size from $\frac{1}{2}$ cubic foot³ up to $\frac{1}{2}$ cubic yard, which are in actual point-to-point contact with one another, and which have substantially no material intermingled with them other than rock spalls or gravel, and these only at places where voids would otherwise exist because of the natural irregularity of the contacting pieces of rock. The terminology and arrangement of the first subparagraph of Paragraph 36(b) plainly manifest an intention that the riprap is to be composed predominantly of rocks, each of which has a volume of at least $\frac{1}{2}$ cubic foot, and that spalls and gravel are to be allowable merely as a filler for voids in the rock mass. In addition, the evidence is to the effect that in order for riprap to be stable and without tendency to slide, the individual rocks must be in point-to-point contact with their neighbors, as otherwise wave action will gradually carry away the filler and erode into the underlying material until the rocks themselves are undermined. We can find no justification in the contract for the concept, under which appellant seems to have labored, that rock spalls and gravel were permissible to an extent which would result in the riprap consisting of a mass of rocks, spalls and gravel in which the individual rocks would frequently be held apart from one another by substantial quantities of spalls and gravel.

In reaching this conclusion we have not overlooked the statement in the second subparagraph of Paragraph 36(b) that rock "suitable for riprap" could be found at two designated sources in the vicinity of the work and "at other locations." The words "suitable for riprap"

³ A volume of $\frac{1}{2}$ cubic foot is approximately equal to the volume of a cube measuring $9\frac{1}{2}$ inches on each edge.

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must, of course, be construed in the light not only of the specific riprap requirements we have just analyzed, but also of the site investigation provision of Paragraph 21A of the specifications. So construed, it seems fairly obvious that these words cannot be held to mean that the removal of rock spalls, gravel, dirt, and vegetative matter, even though readily visible at the designated sources, would not be required of appellant. There is nothing in the record to show that appellant was unaware when he made his bid that at the two designated sources the rock suitable for riprap was partially intermingled with large quantities of other material, or, if he was unaware of this intermingling, that it was a condition which a reasonable investigation of these sources would have failed to disclose. Furthermore, a considerable part of the riprap, seemingly amounting to more than half of the total amount used, was taken by appellant—as he had the privilege to do—from sources other than the two designated in Paragraph 36(b), and proof is lacking that these additional sources were among the “other locations” intended to be referred to in that paragraph. Here again we can find in the contract no justification for appellant’s position.

The Board is satisfied from the evidence that the inspectors did not apply to the riprap more rigorous standards of freedom from rock spalls, gravel, dirt, and vegetative matter than those required by the contract, as properly construed. On the whole, they would appear to have allowed appellant to use riprap containing more, not less, of such material than was consistent with the terms of the contract.

Claim No. 6, therefore, is denied.

Claim No. 3: Machine Placement of Riprap

This claim is for the sum of \$2,495.50 on account of the use of a crane equipped with a dragline bucket in placing the riprap.

Placement of riprap for the shore protection works was started in December, 1956. Initially the riprap was dumped from trucks directly onto the upper part of the slope and permitted to slide down the gravel blanket until it came naturally to rest. Appellant, however, soon changed this procedure to one in which the riprap was dumped onto the level ground above the slope and was subsequently pushed over the edge by a bulldozer, whereupon, as in the initial procedure, it was allowed to slide down the gravel blanket until it came naturally to rest. When a quantity of material had been thus put on the slope, appellant would proceed to smooth it up through the use of a dragline, supplemented by some hand labor.

Beginning about April 1, 1957, appellant shifted to a third procedure under which the riprap, after being dumped on the level

ground above the slope, was picked up in a dragline bucket and dumped from the bucket onto the particular place on the slope where it was needed. In order to carry out this procedure appellant rented a crane having a boom and jib long enough to admit of the dragline bucket with its contents being swung out over any place on the slope while the crane was standing on the level ground above it. A competent operator was also obtained. The crane and its dragline bucket were employed not only to put riprap in areas where none had yet been placed, but also to finish areas on which some riprap had been already placed, either by adding fresh rock or by moving rock from thick spots to thin ones.

Utilization of the procedure just described was suggested to appellant by the Chief Inspector. Appellant contends that the suggestion was made "in a mandatory way"—meaning that it was made in a way which caused appellant to believe that, if it was not followed, a suspension order might be issued or the work might not be accepted. It is, however unnecessary for the purposes of this appeal to determine whether the suggestion was, in fact, a mandatory one.

The evidence shows quite plainly that successful completion of the riprap was not economically feasible through the use of the methods being employed prior to April 1. Under the contract it was necessary that the completed riprap (1) be separated from the underlying soil by the gravel blanket, (2) be stable and without tendency to slide, (3) be free from unreasonably large unfilled spaces, and (4) be of a minimum thickness of 24 inches.

The procedures employed by appellant before April 1 had an apparent measure of success largely because the severe winter weather froze the gravel in place, with the result that it was not materially disrupted by the riprap as the latter slid or rolled down the slope. Once the spring thaw came, however, the heavy rocks would necessarily have tended to gouge or scrape the gravel off the upper part of the slope as they slid or rolled towards the apron, and to push the gravel thus dislodged into piles or ridges on the lower part of the slope. Furthermore, once the spring thaw came, it would have been difficult to operate machines on the slope for the purpose of smoothing the riprap without further disrupting the blanket of gravel.

The success achieved before April 1 was also more apparent than real in that appellant's chief concern at the time was to get the riprap on the slope, rather than to smooth it out into a structure which would meet all of the applicable contract requirements. The procedure of allowing the rocks to slide helter-skelter down the slope resulted in the larger pieces being carried by their greater weight to the bottom of the slope, while the smaller pieces tended to pile up on the upper part.

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The resulting disorderly accumulation needed much smoothing in order to rearrange the material in a pattern that would meet the contract requirements of stability, reasonable freedom from unfilled spaces, and thickness. Still more smoothing would have been needed had the remainder of the riprap been placed by the same procedure. Without the use of a machine that was capable of moving the material about, while it itself was stationed at a point outside the confines of the gravel blanket, the smoothing would have been a tedious and expensive task, the accomplishment of which would probably have entailed much hand labor. The crane with its dragline bucket was a means by which the riprap could be placed to the contract specifications more efficiently and more economically than would have been possible had the methods previously pursued been continued.

Appellant argues that his practice of dumping the riprap from trucks bulldozing it over the edge of the slope was consistent with the statement in Paragraph 36(b) that "rock in riprap need not be hand-placed, but shall be dumped and smoothed * * *." Doubtless it was, but so too was the practice of using the crane, with its dragline bucket, to dump and smooth the riprap. What appellant seems to overlook is that it was not enough just to dump and smooth the riprap. It was also necessary that this be done in such a manner as to insure that the completed riprap would meet the various requirements set out in Paragraph 36(b) and the other relevant contract provisions.

The Board finds that appellant incurred no greater expense in meeting those requirements through use of the procedure suggested by the Chief Inspector than it would have incurred if it had ultimately succeeded in meeting them through continued use of the procedures previously employed. Hence, even if the suggestion were a truly mandatory one that amounted to a change in the contract terms, no equitable adjustment in the contract price would be due appellant, since the cost of performing the contract was not increased above what it would have been if the Chief Inspector had refrained from making the suggestion.⁴

Claim No. 3, therefore, is denied.

Claim No. 1: Measurement of Riprap

This claim is for the sum of \$6,234.75 on account of alleged mis-measurement of the riprap. Payment at the contract unit price was made for the placement of 7,145 cubic yards of riprap as a part of the shore protection works. Appellant asserts that the quantity actually

⁴ See *Younger Bros., Inc.*, IBCA-148, 65 I.D. 238, 242, 58-1 BCA par. 1756 (May 28, 1958).

placed was 8,612 cubic yards, or about 21% more than the quantity for which payment was made.⁵ The claim is for payment of the contract unit price with respect to this difference in quantities.

Both the facts out of which this claim arises and the contractual provisions applicable to it are essentially the same as those involved in Claim No. 2. Consequently, they will not be discussed in detail.

In anything, the preponderance of the evidence against the claim is even greater here than in the case of Claim No. 2. For one thing, the procedures used by appellant in placing riprap prior to April 1, 1957, inevitably tended to build up excesses of material on portions of the slope. It is clear from the evidence that appellant often considered it cheaper to leave such excesses where they were, instead of attempting to move the material to thin spots elsewhere. For another, a comparison by months of the hauling subcontractor's truck measurements with the Government's pay estimates gives rise to a strong inference that the truck measurements, particularly those for the months of November and December 1956, include riprap for use along the side of the cemetery road embankment, as well as riprap for the shore protection works. If so, there would be only a nominal difference between the amount of riprap which appellant claims to have placed, and the amount for which payment was made by the Government.

On the record as a whole we find that the measurements which the inspectors made while the riprap was being placed in order to determine its thickness were substantially correct; that the inspectors did not require appellant to place riprap to a greater thickness than 24 inches; and that the greater thickness which occurred at some locations was due to the manner in which the riprap was placed by appellant, rather than to any instructions or directions of Government personnel. We also consider that the action of the Government in computing the pay quantities for riprap on the basis of the thickness of 24 inches prescribed by the contract, instead of on the basis of the actual thickness of the riprap, was justified by Paragraph 36(c) of the specifications and was otherwise consistent with the provisions of the contract.

Claim No. 1, therefore, is denied.

Road Relocation

The road relocation work provided for in the contract included the making of a cut through a small hill, the construction of an embankment through low-lying land on either side of the hill with fill material obtained partially from the cut and partially from a borrow pit on

⁵ The figures given in this sentence, if adjusted for patent mathematical errors in computation, would be reduced to 8502 cubic yards and 19%.

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the hill, the placing of a gravel blanket and riprap along the side of the embankment in areas where the land was so low as to be subject to inundation from the reservoir, and the construction of a roadway through the cut and along the top of the embankment. Claim No 4 relates to the cut, while Claim No. 5 relates to the embankment, or, as it is generally referred to in the record, the "fill."

Claim No. 4: Soft Spots in Cut

This claim is for the sum of \$639.00 on account of the repair of soft spots in the cut.

The cut was excavated in September or October, 1956. Subsequently the Government determined that the material below the bottom of some parts of the cut was too unstable to afford proper support for the roadway, and appellant was orally instructed to remove this material and replace it with stable fill material. These instructions were given in March, April or May, 1957. By that time gravel for the sub-base and base of the roadway itself had already been placed. This gravel had to be pushed aside while the soft spots of unstable material were being dug out and refilled, and in the process some of the gravel was necessarily lost and had to be replaced.

The Government concedes that the repair of the soft spots in the cut is work that was duly authorized and for which appellant was entitled to payment. Its defense to the claim is that payment of the proper amount has already been made. It contends that the repair was authorized pursuant to Paragraph 37 of the specifications, and that appellant was entitled to obtain merely the contract unit price for the additional units of work performed, rather than the actual cost of such units plus a reasonable allowance for overhead and profit.

The pertinent portions of Paragraph 37 reads as follows:

The roadway sections are shown on the drawings, but the undetermined character of the materials which will form the slopes and roadbed, or other factors, may make it desirable, during the progress of the work, to vary the width of the roadbed or the slopes, alinement, or grades and the dimensions dependent thereon. The roadway shall be excavated to the full dimensions shown on the drawings or otherwise established, and shall be finished to the prescribed lines and grades. * * *

If payment for the repair of the soft spots in the cut was actually made, it was made through the inclusion of the additional work in the unit quantities set out in the monthly and final pay estimates prepared by the Government. So far as the record shows, appellant was never informed of the amount which the Government considered to be payable for the repair until the hearing on this appeal. The computation of the pay quantities and their alleged inclusion in the

estimates was done by Government personnel. In these circumstances we consider that the burden of proving what amount, if any, was actually paid for the repair rested on the Government.

There are material inconsistencies in the evidence upon the subject of payment. The contracting officer in his decision denying this claim stated that payment for the repair of the soft spots in the cut was made under items 6, 14, and 15, pertaining, respectively, to excavation for roadway, sub-base for roadway, and base for roadway, but did not state what the quantities were that had been included in these items on account of such repair. On the other hand, the Projects Manager, who had charge of the Government's bookkeeping for the contract, testified that the only amount included in the pay quantities on account of the repair was 288 cubic yards under item 6, excavation for roadway. The Projects Manager further testified that these 288 cubic yards were included in the pay estimate for November 1956, whereas the Chief Inspector and appellant both testified that the work in question was neither authorized nor performed until the ensuing spring. A possible explanation of this discrepancy is afforded by an intimation in the record that some repair work in the cut, at points other than the one involved in the present claim, was performed during October 1956. The inaccuracy of the contracting officer's findings is also demonstrated by the fact that no quantities for item 14, sub-base for roadway, were included in any pay estimate after that for October 1956. Finally, the Chief Inspector testified that figures on the amount of work performed in making the repair had been prepared for transmittal to the Projects Manager, and that, while he could not remember what the figures were, he did not believe they included any allowance for the earth used to replace that excavated, since he construed the contract as containing no unit price applicable to such replacement material. This was too narrow a construction, since Paragraphs 37 and 38 of the specifications provide that material excavated from borrow for use in building embankment is to be paid for under item 6, and since the earth placed in the bottom of the cut to replace the unstable natural soil could properly be termed embankment for the purpose of those paragraphs. In summary, we conclude that the Government has failed to prove that any payment was made on account of the work covered by the present claim.

Conversely, appellant's evidence concerning the sum that should be paid for the repair of the soft spots in the cut is none too certain. In part at least this can be attributed to the fact that appellant was relying upon the Government to do the bookkeeping. Somewhat incongruously, appellant's claim is computed on the basis of alleged actual costs, plus overhead and profit, for the excavation and filling

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of the soft spots, but on the basis of contract unit prices for the replacement of the sub-base and base. There is no satisfactory evidence of what the actual costs were for any of the work. In the circumstances, we consider that payment should be made on the basis of a fair approximation of the sum that would be payable were the contract unit prices to be applied to those quantities of work that can be reasonably inferred from the evidence as having been necessitated by the repair. We find \$400.00 to be such a fair approximation.

This leaves the question of whether the claim is barred by reason of a failure to comply with the applicable notice or protest provisions of the contract. The contracting officer held that it was, on the ground that appellant had not complied with Paragraph 9 of the specifications. This paragraph—a customary one in Bureau of Reclamation construction contracts—states:

If the contractor considers any work demanded of him to be outside of the requirements of the contract, or considers any record or ruling of the contracting officer or of the inspectors to be unfair, he shall immediately upon such work being demanded or such record or ruling being made, ask, in writing, for written instructions or decision, whereupon he shall proceed without delay to perform the work or to conform to the record or ruling, and, within thirty (30) calendar days after date of receipt of the written instructions or decision (unless the contracting officer shall grant a further period of time prior to commencement of the work affected) he shall file a written protest with the contracting officer, stating clearly and in detail the basis of his protest. Except for such protests as are made of record in the manner herein specified and within the time limit stated, the records, rulings, instructions, or decisions of the contracting officer shall be final and conclusive. * * *

The issue presented by instant claim is the narrow one of whether appellant has been paid the proper amount for work for which the Government concedes he was entitled to be paid something. It is confined still further by our finding that appellant has not borne the burden of proving his actual costs, and is entitled to be paid no more than the applicable unit prices for the work done. So far as the evidence reveals, the first communication to appellant of any instruction, record, ruling or decision upon this issue, whether oral or written, occurred when the decision that forms the subject of this appeal was transmitted to appellant. Prior to that time appellant was not apprised of any determination by the Government with respect to the amount which it considered to be due him, and was unaware that the contracting officer thought that payment had already been made. The issue here presented is thus one as to which there was nothing to protest until the decision now before us was transmitted to appellant. Nor was it incumbent upon appellant to protest that decision, since it was made pursuant to the "Disputes" clause (Clause 6) of

the General Provisions of the contract, and was subject to appeal to higher authority under the provisions of that clause. Clearly, Paragraph 9 of the specifications was not intended to supplant or qualify the appeal procedures set out in the "Disputes" clause. The decision in question having been made the subject of a timely appeal, the contract did not require that it also be made the subject of a protest under Paragraph 9.

Claim No. 4, therefore, is allowed in the amount of \$400.00.

Claim No. 5: Soft Spots in Fill

This claim is for the sum of \$1,008.31 on account of the repair of soft spots in the embankment.

The fill material used for constructing the embankment was in its natural state quite dry, and water had to be added to it in order to achieve proper compaction of the embankment. It was the practice of the inspectors to inform appellant concerning the degree of moisture which they considered requisite for proper compaction, and it was the practice of appellant to follow their wishes in this matter, even though he considered that the moisture content desired by the inspectors was excessive.

After compaction, one section of the embankment was found to be too wet to afford a stable sub-grade, and appellant was instructed to remedy this condition. This he did by removing some of the wet material and replacing it with new. Several months later this same section was found to be still unstable, and appellant was instructed to correct it again. The claim is for the cost of this second repair, the position of appellant being that he should bear the responsibility for the first repair since the extent of the unstable material then taken out had been determined by him.

The resolution of the controversy over this claim turns wholly upon the question of who caused the fill to be too wet in the first place. Appellant says that the inspectors constantly insisted upon a standard of moisture content which he knew, and told them, was excessive. The Government says that appellant accidentally got too much water on this one section of the fill. In particular, the Chief Inspector testified that water from the sprinkler system which appellant used to moisten the earth before its removal from the borrow pit overflowed for a time and ran across the section of fill which ultimately became unstable; and that the sprinkler truck which appellant also used for watering purposes got bogged down on several occasions in this same area of the fill and released additional quantities of water while being extricated.

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On the whole, the evidence supports the Government's version of what happened better than it does the appellant's. Indeed, appellant concedes that some unwanted water was spilled on this section of the embankment from both of the sources mentioned by the Government's witnesses. Moreover, it would seem that if the standard of moisture content adopted by the inspectors had been excessive substantially the entire embankment, and not just one section of it, would have turned out to be too wet.

Claim No. 5, therefore, is denied.

Claim No. 7: Liquidated Damages

Performance of the contract work was not completed until 162 days after the date stipulated in the contract. In his decisions the contracting officer allowed an extension of time of 35 days on account of unusually severe weather during April and May, 1957, but denied all other time extensions requested by appellant. Liquidated damages at the rate of \$20 per day fixed by the contract were assessed against appellant for the 127 days of delay thus left unexcused.

By this appeal further extensions of time in the aggregate amount of 89 days are sought. Granting of these extensions would have the effect of relieving appellant from \$1,780.00 out of the total of \$2,540.00 assessed against him as liquidated damages.

The first time extension now sought is for 37 days on account of extremely cold weather during the period from January 24 to March 1, 1957. No time extension for this period was granted by the contracting officer, since he considered that during it the weather at the job site was of the type normally prevailing there in midwinter.

It is evident from the record that the weather during the period from January 24 to March 1, 1957, was cold enough to make performance of the contract work substantially more expensive than at other seasons of the year, and to induce appellant to suspend all operations at the job site until the cold moderated. However, the governing contract provision (Clause 5, "Termination for Default—Damages for Delay—Time Extensions," of the General Provisions) authorizes the granting of extensions of time, not for severe weather, but for weather that is "unusually severe." This term "does not include any and all weather which prevents work under the contract, but means only weather surpassing in severity the weather usually encountered or reasonably to be expected in the particular locality and during the same time of year involved in the contract."⁶

⁶ 14 Comp. Gen. 431, 433 (1934).

Here the job site was situated at an elevation of about 4900 feet in a region where winter customarily brings with it both cold and snow. The only weather data in the record consists of monthly summaries taken from the records of a United States Weather Bureau station situated within three miles of the job site and at about the same elevation. These summaries show that in 1957 the January temperature was 15.7° , which was 2.3° less than the long-term mean for that month, and that in 1957 the January precipitation was 2.75 inches, which was 9% less than the long-term mean. The February temperature was 29.5° , which was 5.7° more than the long-term mean for that month, and the February precipitation was 3.30 inches, which was 3% more than the long-term mean. These figures would indicate that for the period from January 24 to March 1, viewed as a whole, the weather was slightly better than normal. The only significant adverse factor, namely, the lower than normal January temperature is partially offset by the lower than normal January precipitation, and seems to have been too small a deviation to have added anything material to the difficulties inherent in performing outdoor construction work in an area where the normal January temperature is 18.0° .

The Board finds, accordingly, that appellant is not entitled to an extension of time on account of the weather conditions encountered from January 24 to March 1, 1957.

The remaining time extensions sought total 52 days, all of which is attributed to the performance of additional work. In the main, the additional work alleged consists of that which forms the subject of Claims Nos. 1, 2, 3, 5, and 6. As shown by our previous findings, the work that forms the subject of those claims was not in excess of the requirements of the contract, and no extensions of time would be due appellant on account thereof.

In any event the whole of this part of the claim, including the few days that are sought for items of additional work not included in Claims Nos. 1, 2, 3, 5, and 6, is barred by the release on contract which appellant executed under date of October 5, 1957. By that instrument appellant unqualifiedly released the United States from all claims arising under the contract here in question, "except claim for additional compensation and reimbursement of liquidated damages in the total amount of \$26,149.56. (See enclosed sheets) 1 through 8." The only claim for extensions of time or reimbursement of liquidated damages asserted in the enclosed sheets was a claim predicated on the weather conditions that have been mentioned earlier. These weather conditions were specifically described in sheet No. 7. Nowhere in the enclosed sheets was any mention made of extensions of time or reimbursement of liquidated damages on account of the performance

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of additional or extra work. Under the authorities it is clear that the release on contract bars the allowance of any claim for time extensions predicated on circumstances other than weather conditions.⁷

Finally, appellant contends that no liquidated damages at all should have been assessed, since the unexcused delay of 127 days resulted in no expense, loss or damage to the Government. There are three answers to this contention. First, the Government asserts that it did suffer loss in the form of the inspection and supervision costs incurred by it during these 127 days, and appellant has adduced no evidence to the contrary. Second, the weight of authority is that a liquidated damage provision in a contract governed by Federal law does not become unenforceable as a penalty merely because no loss is actually sustained, if, at the time of the making of the contract, it was reasonable to anticipate the possibility of a loss being sustained should the contract be breached,⁸ and here there is no suggestion that the liquidated damage provision was an unreasonable one as of the time when the contract was made. Third, no such general claim for relief from the imposition of liquidated damages was reserved in the release on contract and its enclosures.

Claim No. 7, therefore, is denied.

CONCLUSION

As indicated above, the appeal is sustained, to the extent of \$400.00, with respect to Claim No. 4, and is denied with respect to the other claims.

HERBERT J. SLAUGHTER, *Deputy Chairman.*

We concur:

THOMAS M. DURSTON, *Member.*

JOHN J. HYNES, *Member.*

ESTATES OF ELAINE LOOKING AND GEORGE LOOKING

IA-936

Decided March 20, 1961

Indian Lands: Allotments: Patents

Where a patent in fee failed to recite the oil and gas reservation provided by the Act of March 3, 1927, 44 Stat. 1401, for the benefit of the Indians having tribal rights on the Fort Peck Reservation, subsequent purchasers of the fee patented land were nevertheless charged with notice of such reservation.

⁷ See *Shepherd v. United States*, 125 Ct. Cl. 724, 741-42 (1953); *J. M. Montgomery & Co., Inc.*, CA-193 (April 9, 1954).

⁸ *Fairbanks, Morse & Co.*, IBCA-146, 65 I.D. 321, 329, 58-2 BCA par. 1867 (August 11, 1958), and authorities there cited.

David D. Unrau, Alvin Unrau, Lena Unrau, E. W. Crawford, Hazel L. Crawford and C. H. Roberts have appealed to the Secretary of the Interior from the action of an Examiner of Inheritance in modifying the original probate orders in the estates of Elaine Looking, deceased Fort Peck Allottee No. 3715, and George Looking, deceased Fort Peck Allottee No. 1488, so as to include the oil and gas rights on Allotment No. 3715 in the inventory of such estates. Appellants claim the oil and gas rights by reason of prior purchase of the lands included in the allotment, asserting that the fee patent issued in connection with such lands contained no reservation of the oil and gas rights. The order of modification was issued on August 6, 1957, and a petition for rehearing denied November 15, 1957.

It is true that the patent in fee, issued on December 21, 1948, contained no reservation as to oil and gas. The original trust patent, however, did recite the reservation made by the Act of March 3, 1927, 44 Stat. 1401. The reservation in the trust patent read as follows:

Also reserving to the United States for the benefit of the Indians having tribal rights on the Fort Peck Reservation all oil and gas in said lands and the right of said Indians to lease the said lands for oil and gas in accordance with the provisions of Section 1 of the Act of March 3, 1927.

The allottee, Elaine Looking, died November 21, 1929, two months after the application for the trust patent was made, and in probate proceedings in 1931, it was determined that her father, George Looking, and her mother, Rosa Flynn Looking, were her sole heirs at law and each entitled to an undivided $\frac{1}{2}$ interest in the allotment. George Looking and Rosa Flynn Looking applied for a fee patent in May 1948, covering their respective interests therein and the patent, issued December 21, 1948, did not contain the reservation of oil and gas for the Indians having tribal rights on the Fort Peck Indian Reservation.

It is the position of appellants that they are bona fide purchasers of the fee patented land, with no notice of the reservation as to oil and gas since they relied on the fee patent issued on December 21, 1948. Under the law, however, as the Examiner points out, such purchasers are charged with knowledge of such reservations even though they are omitted from the fee patent. The applicable rule is well stated by the United States District Court for the District of Montana in its decision in *United States v. Frisbee, et al.*, 57 F. Supp. 299, dealing with a similar situation on the Blackfeet Indian Reservation. There the court said:

The issuing of the patent without the reservations did not convey what the law reserved, and all persons are chargeable with notice thereof. * * * [citations] From the authorities cited it appears that the act of the executive officers of the government issuing the patent without including the reservations aforesaid could not affect such reservations, and the purchasers were chargeable with

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knowledge of the limitations imposed upon the title by Act of Congress; and it was further held that the law becomes a part of the patent that no federal official can waive or render inoperative because of failure to incorporate the limitation or reservation in the patent. 57 F. Supp. 299, 300.

Thus, the appellants' claim of being a bona fide purchaser without notice of the minerals in the Elaine Looking allotment must be rejected.

Tribal rights to the oil and gas so reserved by the Act of March 3, 1927, *supra*, were transferred by the Act of June 30, 1954, 68 Stat. 358, to the allottee or his heirs or devisees. Section 1 of the 1954 act reads:

That the oil and gas in land located within the Fort Peck Indian Reservation, Montana, allotted on or after March 3, 1927 which is now reserved to the Indians having tribal rights on such reservation by the first section of the Act of March 3, 1927 (44 Stat. 1401), relating to oil and gas in certain tribal lands within the Fort Peck Indian Reservation, Montana, is hereby granted to the allottee of such lands, or, if such Indian is deceased, to his heirs or devisees * * *¹

As Elaine Looking received her allotment subsequent to March 3, 1927, it was subject to the 1954 act.

The allottee, Elaine Looking, having died in 1929, and George Looking, one of her two heirs, having died in 1948, it was necessary to modify the probates of their estates to add the oil and gas rights transferred from tribal status by the 1954 act. Since the title to the oil and gas is transferred by the 1954 act in a restricted status except in circumstances not present here,² the property is subject to the probate jurisdiction of this Department.

Appellants also contend that the action of the Examiner disturbs the probate proceedings had in the Montana State Court in the estate

¹ Section 8 of the 1954 act provides that the provisions of the act shall not be effective unless approved in a referendum by a majority of the members of the Fort Peck Tribe actually voting therein, provided that the total vote cast shall not be less than 30 percent of those entitled to vote. Such referendum was duly held on February 18, 1955, and it was certified by the Superintendent that out of a total of 1,850 persons entitled to vote the actual vote was 1,015 for approval and 159 against.

² Section 3 of the Act of June 30, 1954, *supra*, reads as follows:

"Title to the oil and gas granted by this act shall be held in trust by the United States for the Indian owners, except where the entire interest in the oil and gas is granted to Indians to whom a fee patent for any land within the Fort Peck Indian Reservation has heretofore been issued, in which event the unrestricted fee simple title is hereby granted to the Indian owner * * *."

The examiner found that the oil and gas rights in the Elaine Looking allotment pursuant to Section 1 of the 1954 act passed $\frac{1}{2}$ to Rosa Flynn Looking, $\frac{1}{4}$ to Lucille F. Booth, and $\frac{1}{4}$ to Melvin Flynn. Although the Examiner states in his Order Denying Petition for Rehearing that Rosa Flynn Looking and Lucille F. Booth had previously received fee patents with respect to land holdings on the Fort Peck Reservation, he further states Melvin Flynn had never received a fee patent for any of his holdings on the reservation. Since all three heirs and devisees of the oil and gas rights had not received a fee patent for land on the Fort Peck Reservation, the Examiner held the entire interest in the oil and gas rights to be restricted and subject to the jurisdiction of the Department. No objection has been raised as to the accuracy of these statements or conclusions.

of George Looking and constitutes an unauthorized collateral attack on the fee patent. The answer to the first contention is that the Montana court never had any jurisdiction over the oil and gas rights, for although the date of the State court probate proceedings does not appear from the record, if they were before June 30, 1954, the oil and gas rights were in a tribal status, and if after that date the rights were in a restricted status. There is no attack upon the fee patent because, as indicated before, the oil and gas rights were not included in it, being reserved therefrom by the Act of March 3, 1927, *supra*.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(3)(a), Departmental Manual, 24 F.R. 1348) the action of the Examiner of Inheritance is affirmed, and the appeal is dismissed.

EDWARD W. FISHER,
Deputy Solicitor.

EDWARD W. HARRINGTON

A-28585

Decided March 24, 1961

Alaska: Homesteads—Alaska: Indian and Native Affairs—Indian Allotments on Public Domain: Generally—Bureau of Land Management—Bureau of Indian Affairs

Where the Department has held that part of the land, in Alaska, included in a notice of settlement location or occupancy is in a prior approved Indian allotment to an allottee, now deceased, and where the settler has built improvements on the land in conflict which he continues to occupy, the initiation and prosecution of the steps necessary to convey the land to the settler or remove him from it are to be undertaken by the Bureau of Indian Affairs which has the responsibility for determining heirs and supervising conveyances of allotted land, not by the Bureau of Land Management, and instructions issued by a land office of the Bureau of Land Management setting a 90-day period within which the settler must reach an agreement with the heirs of the allottee or be removed from the land are set aside.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

In *Edward W. Harrington*, A-27823 (June 15, 1959), the Department held a notice of location of settlement or occupancy filed by Harrington was properly rejected in so far as it conflicted with a prior outstanding Indian allotment of Sam Dennis, which had been approved by the Department.

From the facts stated in that decision it appears that Harrington constructed a house on that portion of his homestead which fell into the Indian allotment. Upon the issuance of the Departmental decision, the manager of the Juneau land office notified Harrington by

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letter dated July 13, 1959, that he had 90 days to enter into an agreement with Bert Dennis, the son of Sam Dennis, for purchase or lease of that portion of the allotment containing his improvements, failing which a notice would be issued by the land office requiring him to remove or have removed or to make other disposition of his improvements.

Upon appeal, the Director affirmed the manager's action, holding that it was consistent with the prior decisions of the Department and the Acting Director (of the Bureau of Land Management) and that Harrington could not now challenge such a requirement because he had failed to attack it when he appealed to the Secretary from the Acting Director's decision in which it was first made.

In his appeal to the Secretary, Harrington contends that the manager lacked authority to impose a 90-day limitation upon negotiations, that the Bureau of Indian Affairs had instructed Bert Dennis not to negotiate with him so that negotiation was impossible and that if the land is in an Indian allotment, which he does not admit, it is subject to the jurisdiction of the Bureau of Indian Affairs and not the Bureau of Land Management.

Although it might have been preferable for Harrington to appeal from the subsidiary rulings of the Acting Director as well as from the major one, I do not feel that in the circumstances he should now be foreclosed from seeking review of what is in some aspects an entirely separate action of the manager.

The Department's decision of June 15, 1959, held that Sam Dennis had obtained a vested right to his allotment upon its approval in 1915 by the Secretary and that it needed no further approval.

From then on, the land was segregated from the public domain. As allotted Indian land subject to a restriction on alienation,¹ its disposition is subject to the control of the Commissioner of Indian Affairs.² The regulations relating to the sale of allotments are found in 25 CFR Part 121 and contain detailed provisions controlling the manner in which sales are held. In general, sales are to be made only after appraisal, advertisement and bid, 25 CFR, 1959 Supp., 121.9 *et seq.*, but in certain circumstances a conveyance may be negotiated. *Id.*, 121.18(a). A negotiated sale to a non-Indian can be made only when the Secretary (or his delegate) determines that it is impractical

¹ Originally, homestead allotments in Alaska were inalienable, but the act of August 2, 1956, amended the act of May 17, 1906, to permit conveyance of allotted lands with the approval of the Secretary of the Interior (48 U.S.C., 1958 ed., sec. 357).

² The pertinent regulation dealing with allotments of public lands in Alaska to Indians provides that applications for approval of conveyance by an allottee or his heirs must be filed with the appropriate office of the Bureau of Indian Affairs. (43 CFR, 1959 Supp., 67.8.)

to advertise. *Id.* There is no indication in the record that any of the steps necessary to a sale have been undertaken by the heirs of the allottee or that they intend to do so.

Furthermore, although the Acting Director would have Harrington negotiate with Bert Dennis and the other heirs of Sam Dennis, he did not state on what basis Bert Dennis or any one else had been found to be the heir or heirs of Sam Dennis. On this point, too, the regulations set out in great detail the procedure to be followed in the determination of heirs of Indians who are possessed of trust or restricted property. 25 CFR Part 15. Again, there is no indication in the record that the heirs of Sam Dennis have been determined in accordance with the pertinent regulations.

In view of the fact that neither the determination of the heirs of Sam Dennis nor the preliminaries for the sale of the allotment have been carried out in accordance with the requirements of the regulations, I conclude that the manager imposed conditions on Harrington which he could not satisfy and which, consequently, should be and are set aside.

There still remains the problem of how to resolve the conflict between the heirs of Sam Dennis and Harrington. Although the settler is now a trespasser on the allotment, and must either acquire some legal basis for remaining on the land or leave it, the land, as allotted land, is subject to the administration of the Bureau of Indian Affairs, which, in addition, has jurisdiction over the determination of heirs and the conveyance of the land. Hence, in view of the several related steps which must be initiated and followed through in the Bureau of Indian Affairs, I believe it best in addition to setting aside the conditions imposed on Harrington by the manager, to remand the case with instructions that the manager inform the proper office of the Bureau of Indian Affairs that the Bureau of Land Management will take no further action in the matter, but will leave to the Bureau of Indian Affairs the determination of which heirs of Sam Dennis are entitled to the allotment and the protection of their rights in the allotment.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director is reversed and the matter is remanded for further proceedings in accordance with this decision.

EDWARD W. FISHER,
Deputy Solicitor.

ROBERT L. MILLER***A-28596***Decided March 14, 1961***Homesteads (Ordinary): Settlement—Alaska: Homesteads**

A notice of location of a homestead settlement is properly rejected where at the time it is made the land involved is withdrawn from settlement.

Federal Employees and Officers: Authority to Bind Government.

An applicant can gain no right to public land because he may have been misinformed by the land office that the land was available.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Robert L. Miller has appealed to the Secretary of the Interior from a decision dated July 15, 1960, of the Acting Director of the Bureau of Land Management which affirmed the rejection by the manager of the Anchorage land office of his notice of location of settlement or occupancy claim in Alaska, filed by him on August 19, 1958, for the $W\frac{1}{2}SE\frac{1}{4}$, $SE\frac{1}{4}SE\frac{1}{4}$ sec. 14, T.11N., R.3W., Seward Meridian, Alaska.

It appears that Miller, at the time he filed his notice, was a resident of Tulsa, Oklahoma; that his wife had gone to Alaska, in the summer of 1958, to explore the possibilities of settling in Alaska; that she had sought a suitable homestead in the Anchorage area; and that with the help of a clerk in the land office, she chose the 120 acres in section 14 as suitable and available for homesteading. After filing the settlement notice, Mrs. Miller returned to Tulsa.

On December 31, 1958, Miller wrote the manager from Tulsa that he was awaiting completion of his negotiations for employment in Alaska and asked for six months extension for occupation of the land he had applied for.

The Anchorage land office, in a letter dated February 11, 1959, informed Miller that his notice of settlement or occupancy had been assigned serial number Anchorage 044974, that the lands were covered by a prior similar notice filed by Gerhard Preuss (Anchorage 044575) and by a filing of the Alaska Department of Lands (Anchorage 045716). Miller was informed that he might withdraw his notice and have his filing fee returned.

Miller replied in a letter dated February 24, 1959, that he had understood that there were no previous claims on the land and asked for clarification. On April 14, 1959, the land office again informed Miller that the lands were within the notice of claim filed by Preuss, that the $W\frac{1}{2}SE\frac{1}{4}$ was also within the settlement claim of a Mr. Saw-

*Not in chronological order.

yer, and that all of the land was within a selection by the State Department of Lands.

It appears that Miller came to Alaska in June of 1959, checked the land itself and found it was vacant and undeveloped, and

[t]hen I checked at the land office and was relieved to find the State of Alaska Serial # Anchorage 045716 had not been filed until after ours on September 11, 1958 and that our homestead had been properly entered on the status map.

A clerk explained that it was not necessary to contest a filing made after ours until one of the above persons should apply for a patent. Also she explained that at one time the State or Territory had withdrawn considerable land in that area but that it did not include our land but merely bordered around it both at the time of our filing and at that time and that it was possible that the State might have an incorrect description which might erroneously include our land and the best thing to do would be to wait until they might apply for patent for if an error had been made it would probably [sic] get straightened out before then and in short according to the land office at that time it was alright to enter and develop this homestead. It was also noted of course that the States filing was made after ours.

Assured by my trip to the land office that everything was in order and that if the land was still unoccupied the most lost was the time lost from our residence requirement which would mean that we would have to spend another year on the land before applying for a patent, I faced the chore of constructing a road and placing a "livable house on the homestead as required against the deadline of our first year." (Miller's Statement of Reasons in Appeal to the Director of the Bureau of Land Management, pages 5-6.)

Thereafter Miller had a road constructed, first built a small house and then moved a six-room house on to the land as a permanent home.

On December 28, 1959, the manager issued a decision rejecting Miller's application on the ground that his claim was included within a valid prior filed selection made by the State of Alaska under the act of January 21, 1929, July 28, 1956, or July 7, 1958.

From the Director's affirmance of the manager's decision Miller has taken this appeal.

The land covered by the appellant's notice lies inland from the shore of Turnagain Arm, about 12 miles south of Anchorage. It and other land were withdrawn from all forms of appropriation under the public land laws and reserved, under the jurisdiction of the Secretary of the Interior, pending relocation of a portion of the Anchorage-Seward highway, by Public Land Order 576, dated March 29, 1949 (14 F.R. 1614, 1615). It and other land were restored to homestead and other entry by Public Land Order 1654, dated June 13, 1958 (23 F.R. 4411), subject to certain conditions. First, the order provided that:

3. In accordance with section 202(b) of the act of July 28, 1956 (70 Stat. 709; 711) and subject to the requirements of that act, the Territory of Alaska shall be entitled until 10:00 a.m. on September 12, 1958, to a preferred right of selection of the lands opened by paragraphs 4 and 5 of this order, in connection with its mental health program, except as against prior existing valid rights or as against equitable claims subject to allowance and confirmation.

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It then provided for the opening of the restored land to various types of entry at different times, the earliest of which was 10:00 a.m. on September 12, 1958, and the latest 10:00 a.m. on December 12, 1958, and directed that any entries made before the date on which the land was opened to that type of entry would be considered as filed as of the latter date. The Territory of Alaska filed its preference right selection on September 11, 1958.

Since the earliest date on which other applications could be considered as filed was September 12, 1958, it is apparent that, although Miller filed his settlement notice on August 19, 1958, it must be considered as filed no earlier than September 12, 1958. Thus, it is clear, as the Acting Director pointed out, that under the terms of the restoration order, the State selection is to be treated as having been filed first and that the State has a preferred right to the land.

The appellant offers several arguments to support his contention that the State's preference right should not take precedence over his settlement notice. First, he contends that employees of the land office erroneously informed him that the land covered by his notice was open to settlement and that the land status maps did not indicate that the land was withdrawn. Assuming that the facts are as the appellant states them, they do not justify a different conclusion. The Department has often held that an applicant seeking rights in public lands can gain no right to any land upon the assurance of a land office employee that the land he desires is open to acquisition where in fact it is not. *John E. Engdall*, A-28371 (August 2, 1960); see *Orvill Ray Mickelberry*, A-28432 (November 16, 1960); *Gerald C. Chisum*, A-28295 (June 7, 1960). Similarly, the fact that the status map incorrectly indicated that the land covered by Miller's settlement notice was open to settlement cannot render inoperative a withdrawal to which the land was actually subject. Cf. *Linville v. Clearwaters et al.* (On Review), 11 L.D. 356 (1890).

Next, Miller insists that the 16 or 17 month delay between the time he filed his notice and the manager's decision was so long that the United States should now be estopped from rejecting it. While the decision from which this appeal arises was made on December 28, 1959, Miller knew long before then that there were other claims covering the land. The land office informed him on February 11, 1959, that his entry was covered by a filing of the Alaska Department of Lands, and again on April 14, 1959, it wrote him that the land was within a selection made by the State Department of Lands. Both these letters were received by Miller while he was still in Oklahoma. When he came to Alaska in June, he visited the land office, ascertained that the State selection was filed after his notice, and apparently con-

cluded that since his filing was first, the State's was subordinate to his. His conclusion, of course, was erroneous.

It is thus apparent that Miller knew of the possibility, if not the certainty, of a serious conflict involving his settlement before he had done more than stake the land he desired. In the circumstances, there is no basis for Miller's contention that the long delay was the equivalent of the "allowance" of his notice of settlement.¹

Miller also argues that the land was unsurveyed until the plat of survey was filed on June 15, 1960, and that until then it was impossible to determine the area withdrawn by PLO 576 or 1654. It is not clear how this assertion, even if it were accurate, and it does not appear to be, would help him. Although the plat of survey was not filed until June 15, 1960, it had been approved on February 26, 1957, and presumably was available in the Anchorage land office. It is noted that the appellant described the land in his notice of settlement by legal subdivisions, not by metes and bounds as is required for unsurveyed lands.

Furthermore, the plats of survey covering sections 4, 10, 15, 23 and 26, T.11N., R.3 W., the sections bordering on Turnagain Arm, were approved on October 28, 1954, and filed on December 22, 1954. These surveys established the meander line of Turnagain Arm from which the extent of the withdrawal is determined. *Richard L. Oelschlaeger*, 67 I.D. 237, 239 (1960).

Miller next contends that the State did not gain a preference right over him because it did not comply with the requirements of law in exercising its preference right in that it failed to post notices on the land it selected within sixty days prior to the date of its selection. This argument appears to be based on the provisions of the regulation governing grants to Alaska for the mental health program which required Alaska to post the lands it desired to select under the act of July 28, 1956, *supra*, in order to segregate them from all appropriations based upon settlement or location. 43 CFR 76.11, Circular 1994, 23 F.R. 1030. This provision, which has been replaced by one segregating the land on application and requiring publication after filing an application for selection, 43 CFR, 1959 Supp., 76.9(d), 76.16, 76.17, was pertinent to selections made in lands otherwise open to appropriation. It did not apply to lands restored from a withdrawal which were not open to other appropriation until after the State's preference right period had expired. The State lost nothing by not complying with this regulation.

Finally Miller maintains that land covered by paragraph 5 of PLO 576 was restored to entry by PLO 601, as amended by PLO 757 (43

¹ See *Jones v. United States*, 195 F. 2d 707 (9th Cir. 1952), in which it was held that the action of agents of the Bureau of Land Management in standing idly by while claimant built a \$50,000 lodge upon a tract of land embraced in a withdrawal of unsurveyed public land in Alaska could not affect the Government's title or right to possession.

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CFR, 1953 Supp., pp. 279, 377). This contention is without merit. It is sufficient to point out that PLO 601 and 757 dealt generally with lands along the entire length of several major highways in Alaska while paragraph 5 of PLO 576 was concerned with the relocation of one segment of one highway within an 11 mile stretch of land. The withdrawal it effectuated persisted until it was specifically revoked by PLO 1654.

There remains only one more point. The manager and Acting Director rejected Miller's notice of settlement because the State had filed a preference selection for the same land. A more accurate statement of the reason for rejecting Miller's notice of settlement claim is that the land was withdrawn from settlement at the time he made his location. *Eugene T. Meyer*, A-27729 (December 17, 1958); *Paul Abernathy*, A-28292 (July 11, 1960). Paragraph 5 of PLO 1654 provided that the unsurveyed land restored to entry would be open to settlement under the homestead laws beginning 10:00 a.m., September 12, 1958. Thus, when Miller initiated his settlement on June 18, 1958, or on August 19, when he filed his notice of settlement, the lands were not open to settlement, and an attempt to settle on them gained him nothing at that time.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management is affirmed.

EDWARD W. FISHER,
Deputy Solicitor.

KAY ANN TURNER

A-28691

Decided March 23, 1961

Rules of Practice: Appeals: Dismissal—Practice before the Department: Generally

When a person not authorized to practice before the Department takes an appeal to the Secretary on behalf of another and is informed by the Department of the requirements for practice before the Department and fails to show his qualification under the requirements, the appeal will be dismissed.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

On February 24, 1960, the land office at Reno, Nevada, rejected a small tract application submitted on behalf of Kay Ann Turner. Miss Turner appealed to the Director of the Bureau of Land Management and on September 23, 1960, the Acting Director affirmed the land office decision.

On October 24, 1960, John L. Artz, describing himself as a long-time family friend, filed an appeal to the Secretary of the Interior on behalf of Miss Turner. On November 18, 1960, the Deputy Solicitor informed Artz that practice before the Department is restricted to attorneys at law with a few exceptions which are specifically described in departmental regulations, and he was invited to advise whether he is an attorney or within one of the excepted categories indicated in the regulations. On December 13, 1960, Artz answered:

I am not an attorney. I qualify to represent Miss Turner under the exception listed as (vii) in 43 CFR 1, 3(b)(3).

The portion of the regulation to which Artz refers permits an individual not otherwise authorized to practice

on behalf of * * * (vii) an association or class of individuals who have no specific interest that will be directly affected by the disposition of the particular matter.

It is obvious that Miss Turner does not fall in the category described as she is neither an association nor a class of individuals and she has a specific interest that will be directly affected by the disposition of this case.

It is clear that Artz was fully informed by the Deputy Solicitor's letter of November 18, 1960, of the requirements for practice before the Department so that he had an opportunity to show any qualification that he had for prosecution of the appeal and that he failed to do so. Accordingly, it is necessary to conclude that he is not authorized to present an appeal on behalf of an applicant for public land and the appeal must be dismissed. *Ben P. Gleichner*, 67 I.D. 321 (1960).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the appeal of Kay Ann Turner is dismissed.

EDWARD W. FISHER,
Deputy Solicitor.

MERWIN E. LISS

A-28576

Decided March 23, 1961

Oil and Gas Leases: Six-mile Square Rule—Oil and Gas Leases: Acquired Lands Leases

An acquired lands oil and gas lease offer filed on January 28, 1955, describing lands which cannot be encompassed within a 6-mile square limit must be rejected.

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Oil and Gas Leases: Six-mile Square Rule—Oil and Gas Leases: Description of Land

The determination as to whether lands applied for in an oil and gas lease offer can be included in a 6-mile square is made on the basis of the offer as it is filed and where it is clear that the lands applied for cannot be included within a 6-mile square, the offer must be rejected in its entirety despite the fact that the part of the land applied for which causes the offer to violate the 6-mile square rule is inadequately described and the offer would be rejected as to it in any event.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Merwin E. Liss has appealed to the Secretary of the Interior from a decision dated June 23, 1960, of the Acting Director of the Bureau of Land Management which affirmed the rejection of his noncompetitive offer to lease for oil and gas federally owned lands pursuant to the Mineral Leasing Act for Acquired Lands (30 U.S.C., 1958 ed., secs. 351-359).

The Liss offer, BLM-A 039615, encompassing approximately 1,971.47 acres of land in the Monongahela National Forest, described the land applied for in two parcels, one a contiguous group of tracts referred to by the tract numbers used in the acquisition of the land by the United States and the other a portion of one such tract separated from the first group by over 2½ miles and described by metes and bounds in terms of the outside boundary of the tract and a line through it. The distance from the northern tip of the first group of tracts to the southern limit of the second parcel is more than seven miles.

At the time Liss filed his offer on January 28, 1955, the pertinent regulations governing the leasing of acquired lands provided:

§ 200.4 *Other regulations applicable.* Except as otherwise specifically provided in §§ 200.1 to 200.36, inclusive, the regulations prescribed under the mineral leasing laws and contained in Parts 70, 71, and 191 to 198, inclusive, of this chapter, shall govern the disposal and development of minerals under the act to the extent that they are not inconsistent with the provisions of the act. Any lease or permit issued under the act shall state that it is subject to the terms and provisions of the act.¹

§ 200.5 *Supplemental information required in lease or permit applications, and place for application-filing.* (a) Each application for lease or permit must contain (1) a statement that applicant's interest, direct or indirect, in leases, permits or applications for similar minerals does not exceed a maximum chargeable acreage permitted by law to be held for that mineral in federally owned acquired land in the same State, and (2) a complete and accurate description of the land for which a lease or permit is desired. If surveyed according to the governmental "rectangular system," it should be described by legal subdivision, section, township and range, and if not so surveyed, by metes and bounds con-

¹ Separate applications must be made for public lands and acquired lands.

nected with a corner of the public surveys by courses and distances, or described in a manner consistent with the description in the deed to the United States. The description should, if practicable, refer to (i) the administrative unit or project of which the land is a part, the purpose for which the land was acquired by the United States, and the name of the governmental body having jurisdiction over the land (ii) the name of the persons who conveyed the land to the United States, (iii) the date of such conveyance, and the place, liber and page number of its official recordation. * * * Circular 1886, 19 F.R. 7127.

The appropriate regulations governing oil and gas leases are in 43 CFR, Part 192. At the time Liss filed his offer the pertinent regulation read:

(d) Each offer must be filled in on a typewriter or printed plainly in ink and signed in ink by the offeror or the offeror's duly authorized attorney in fact or agent. An offer may be made by a legal guardian or trustee in his name for the benefit of a non-alien minor or minors but an offer may not be filed by a minor. Each offer must describe the lands by legal subdivision, section, township, and range, if the lands are surveyed, and if not surveyed, by a metes and bounds description connected with a corner of the public land surveys by course and distance and must cover only lands entirely within a six-mile square. Each offer must be for an area of not more than 2,560 acres except where the rule of approximation applies, and may not be for less than 640 acres except in any one of the following instances:

(1) Where the offer is accompanied by a showing that the lands are in an approved unit or cooperative plan of operation or such a plan which has been approved as to form by the Director of the Geological Survey.

(2) Where the land is surrounded by lands not available for leasing under the act, except that where the tract was isolated as the result of a partial relinquishment of a lease, no lease offer will be received for the relinquished land other than one filed under the conditions prescribed in subparagraph (1) of this paragraph for a period of 60 days from and after the date of filing of the partial relinquishment. 43 CFR, 1954 ed., 192.42(d).

The Eastern States land office, which first considered Liss' offer, held that the description for the partial tract was deficient because the line used to divide the tract was not described by course and distance and that the offer must be rejected in its entirety because the exterior limits of the land applied for are not within a 6-mile square area.

On appeal, the Director affirmed on the ground that an acquired land oil and gas lease offer must be rejected if it describes lands that cannot be encompassed in a 6-mile square even though the land outside the 6-mile square has not been adequately described.

The appellant contends that the 6-mile square limitation was not applicable to acquired lands at the time he filed his offer and that, even if it were, it only applies to the land properly described in his offer.

As we have seen, the regulations quoted above subjected an acquired lands offer to the regulations prescribed under the mineral leasing laws, and the pertinent oil and gas regulation imposed the mandatory

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6-mile square limitation on offers to lease subject to its terms. It is well established that, under the oil and gas regulation as it read when Liss filed his offer, an offer violating the 6-mile square limitation was to be rejected with loss of priority. *Arnold R. Gilbert*, 63 I.D. 328 (1956); see *Lynn Nelson et al.*, 66 I.D. 14 (1959); 43 CFR 192.42 (g) (1) (i).

Since Part 200 contained no specific provision relating to the areal extent of lands covered by an acquired lands oil and gas lease offer, it would appear that the pertinent provision of Part 192 was applicable and that if Liss' offer did not comply with the 6-mile limitation it was properly rejected.

The appellant, however, argues that an examination of the development of the two regulations, 43 CFR 192.42(d) and 200.5, demonstrates that the 6-mile square limitation did not apply to the latter. I find this contention without merit. The material consideration is what the regulations required when Liss filed his offer. Since at that time the acquired lands regulation was silent as to the limits within which an offer must be confined, the pertinent provision of the public domain regulations governed acquired land offers.

Liss cites *S. J. Hooper*, 61 I.D. 346, 350 (1954), and *Bert Wheeler*, 67 I.D. 203 (1960), as requiring a contrary conclusion. In the *Hooper* case the Department held that a specific part of the regulation in 43 CFR 200.5 remained binding on an offer despite a change in the corresponding requirement in Part 192. In this case there is no conflict.

The *Wheeler* case held only that where Part 200 contains specific requirement in the other controlling regulation.

The *Wheeler* case held only that where Part 200 contains specific detailed provisions, an amendment of a corresponding provision of Part 192, which was not applicable to acquired lands offers prior to the amendment because of the specific provisions of Part 200, did not apply to acquired lands offers unless the corresponding acquired land regulation was expressly amended in the same manner. Again, since in this matter there was no provision at all in Part 200 which paralleled the 6-mile square limitation of Part 192, I cannot see how the rule of the *Wheeler* case is pertinent.

Therefore, it is concluded that at the time Liss filed his offer the 6-mile square limitation applied to it and that it was proper to reject his offer for failure to comply with it.¹

¹ It is interesting to note that on October 15, 1958, two weeks before the rejection of appellant's offer by the land office, he filed a protest against a prior acquired lands lease offer, BLM-A 038977, which apparently covered two of the tracts included in appellant's offer. The protest was based on the ground that the prior offer, "at the time it was filed and until long after the Liss application was filed, covered an area more than six miles square, contrary to the provisions of the applicable regulations." Presumably the appellant had no doubt at that time that the 6-mile square rule applied to acquired lands offers filed through the date on which he filed.

Finally the appellant states that, even if this conclusion is valid, it is not determinative of his rights because the tract which lies beyond the limits of a 6-mile square was insufficiently described and should not be considered in applying the 6-mile square limitation. He says that since a lease could not be issued for such land, it should not be considered in ascertaining the extent of the land covered by his offer.

This argument overlooks the fact that the regulation is concerned with offers, not with leases, and requires the rejection of an offer which exceeds the permissible limit. If an offer contains tracts which are insufficiently described, it will not be rejected in its entirety where it is not apparent that the land applied for cannot be contained in a 6-mile square (*Duncan Miller*, 66 I.D. 370 (1959)), but where it is as plain as it is here that the offer violates the 6-mile rule, it must be rejected even though the peripheral tracts are improperly described. That is, the fact that land is so poorly described that it cannot be located does not of itself require the rejection of all the land covered by an offer on the supposition that some land applied for may be beyond the 6-mile square limit, but where the lands applied for, albeit described defectively, are shown conclusively to exceed the permissible limit, the whole offer is defective. Thus the inadequate description affords no reason to remove the appellant's offer from the stricture of the 6-mile square limitation.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director is affirmed.

EDWARD W. FISHER,
Acting Solicitor.

GRACE M. SPARKES

A-28606

Decided March 28, 1961

Mining Claims: Surface Uses—Surface Resources Act: Verified Statement

Where a mining claimant who has received a notice of publication pursuant to section 5 of the act of July 23, 1955, submits a statement in which she describes the land as not being within the area of publication, her statement is properly rejected and she may not file an amended statement 2 years later in an attempt to preserve her rights to the surface resources of the mining claims which are in fact within the published area.

Surface Resources Act: Verified Statement—Applications and Entries: Generally

A mining claimant who files a verified statement under section 5 of the act of July 23, 1955, is responsible for the accuracy of the description of the

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mining claims listed in the statement, and he cannot expect the land office to correct any error in the description.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Grace M. Sparkes has appealed to the Secretary of the Interior from a decision dated July 15, 1960, of the Acting Director of the Bureau of Land Management which affirmed the rejection of a verified statement filed by her on December 3, 1959, pursuant to section 5 of the act of July 23, 1955 (30 U.S.C., 1958 ed., sec. 613).

Miss Sparkes is the owner of eight lode and two placer mining claims situated in Yavapai County, Arizona, within the Prescott National Forest. On May 18, 1957, a notice was published at the request of the Forest Service to determine the surface rights under the act of July 23, 1955, to a large area of forest lands, some surveyed and some unsurveyed (the so-called Prescott area). Miss Sparkes was mailed a copy of this notice to mining claimants on May 20, 1957.

The notice described the lands to which it pertained by sections, if surveyed, and, if unsurveyed, by the sections which would probably embrace such lands when the surveys are extended to them.

The notice repeated the requirements of section 5 of the statute (*supra*) and informed all mining claimants that if they wished to claim or assert any right, title or interest in the surface resources on the basis of their mining claims, they must file a verified statement within 150 days of the first date of publication, which, among other items, must set forth

the section or sections of the public land surveys which embrace such mining claims; or if such lands are unsurveyed, either the section or the sections which would probably embrace such mining claim when the public land surveys are extended to such lands or a tie by courses and distances to an approved United States mineral monument; * * *. (30 U.S.C., 1958 ed., sec. 613(a)(3)).

On August 26, 1957, Miss Sparkes filed a statement in which after listing her 10 mining claims she said:

3. Uncertain as exact identifications. Probably Sections 32 and 33 T. 12. Range 2 West (unsurveyed and perhaps extends south of the town line and the Prescott National Forest Reserve, Yavapai County, Arizona.

Perry L. Bones was at three approved U S Mineral Monuments, after forest fire could only find two.

Grace M. Sparkes was at two approved U S Mineral Monuments, and after forest fires could only find one.

In a decision dated December 11, 1957, the manager rejected the appellant's verified statement, holding "that [it] was defective in that the description is inadequate, and Secs. 32 and 33, T. 12 N., R. 2 W., G S R Mer., Arizona, lie outside the lands that were embraced in the Prescott Area publication. Lands embraced in publication of T. 12

N., R. 2 W. include secs. 1, 2, 3, 4, 11, 12, 13 and 24." The decision also allowed Miss Sparkes 30 days in which to file an amended statement or to file a completely new verified statement or appeal to the Director of the Bureau of Land Management. When no appeal was filed or other action taken, the case was closed.

On December 3, 1959, almost two years later, Miss Sparkes filed a corrected verified statement in which she described the claims as being located in secs. 32 and 33, T. 13 N., R. 2 W., G. S. R. meridian (surveyed), and secs. 20 and 21, T. 12½ N., R. 2 W., G. S. R. meridian (unsurveyed). She also submitted a resume of her attempts to ascertain the accurate location of her mining claims, saying that she had relied upon the identification made by a professional mining engineer and a professional geologist in her last report and that not until September 3, 1959, had the County Engineer properly located the claims for her.

In a decision dated April 6, 1960, the manager rejected the corrected verified statement, pointing out that:

the first survey of T. 13 N., R. 2 W., was accepted in 1872, and a resurvey was made in 1932, so it appears that the location of the claims could have been definitely established in 1957, and an amended verified statement filed within the time allowed by our decision of December 11, 1957.

The Acting Director affirmed for the reasons that a mining claimant must know the area covered by his claims, that in her original statement the appellant described lands several miles distant from the Prescott area, that the statement on its face indicated no necessity for filing, that in such circumstances the statement was properly rejected, and that, having failed to avail herself of the time allowed by the manager's decision of December 11, 1957, the appellant cannot now file a corrected statement.

On appeal, Miss Sparkes contends that in making the examination of the lands and local records required by the statute as a preliminary to filing a request for publication (30 U.S.C., 1958 ed., sec. 613(a)), the Forest Service must have ascertained that the mining claims were within and not without the published area, that the affidavit filed by the Forest Service refers to the house, buildings, and various tunnels and shafts on the property, and that Miss Sparkes was led to believe her claims were not within the published area, whereas both the Forest Service and the manager could have told Miss Sparkes where her claims were actually located.

Although the affidavit is not in the record of this case, it is apparent that the Forest Service must have found Miss Sparkes' claims to be within the area of publication because it mailed her a copy of the notice

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of publication, which the statute (30 U.S.C., 1958 ed., sec. 613(a)) requires to be mailed "to each person in possession or engaged in the working of the land whose name and address is shown by an affidavit filed as aforesaid, * * * and * * * to each person whose name and address is set forth in the title or abstract company's or title abstractor's or attorney's certificate filed as aforesaid, as having an interest in the lands described in said notice under any unpatented mining claim heretofore located * * *" Miss Sparkes must have come within one of these two groups to have been mailed a copy of the notice.

The appeal, thus, raises the question of who, in the last analysis, must bear the responsibility for the accuracy of the information set out in the verified statement, the mining claimant or the department or agency seeking to determine the surface rights to public land. More particularly, must the public body check the statements against its record to see whether a claimant has made a mistake in description or may it rely upon the description submitted by the claimant and dispose of the statement accordingly?

The general rule is that an applicant is responsible for the accuracy of the statements he makes in the documents he files with the land office and that he cannot expect the personnel of the land office to correct his filing to conform it to his intentions. *D. Miller*, A-26854 (June 21, 1954); *Duncan Miller*, A-27535 (March 10, 1958); *Orvil Ray Mickelberry*, A-28432 (November 16, 1960).

I can see no reason why this rule does not apply to the situation in which the applicant finds herself. She was informed that the Forest Service considered her land to be within the area of publication and was offered alternative methods of describing the location of her mining claims. She chose to describe them in terms of what sections they would fall into when surveyed and her description placed them without the area of publication. In the circumstances, the only course the land office could take was to reject her verified statement and give her an opportunity to correct it if she desired. The period of publication having terminated long since and the appellant having failed to take corrective action within the time allowed, she cannot some two years later file the statement she was required to file then.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director is affirmed.

EDWARD W. FISHER,
Acting Solicitor.

APPEAL OF SEAL AND COMPANY

IBCA-181

*Decided March 28, 1961***Contracts: Appeals—Rules of Practice: Appeals: Hearings**

A hearing upon a contract appeal is not made inadequate because oral argument was had before a person who does not participate in the decision of the appeal, where the persons who do participate have before them notes containing the gist of the oral argument in addition to the written briefs of the parties.

Contracts: Acts of Government—Contracts: Changes and Extras—Contracts: Damages: Unliquidated Damages—Contracts: Protests

A claim based on the failure of the Government to close a road pursuant to the terms of a contract for the construction of structures under or beside such road is a claim for breach of contract, but a claim based on a sequence of work ordered by the Government in order to mitigate the consequences of such failure may amount to a claim for a change in the contract specifications. No price adjustment on account of such a change, however, is allowable for (a) stoppage by the Government of operations being performed by the contractor that contravene oral instructions concerning the sequence of work, where the contractor had not observed the procedure established by the contract for protesting oral instructions; (b) operations performed on the contractor's own initiative, where such operations were occasioned by the failure to close the road rather than by the sequence of work ordered, and where their performance was not compelled by either of these acts of the Government; or (c) increased supervision expense incident to a prolongation of the performance period that is caused by the Government's instructions concerning the sequence of work.

BOARD OF CONTRACT APPEALS

Appellant filed on January 19, 1961, a motion for reconsideration of the Board's decision of December 23, 1960. In that decision appellant's appeal was sustained, to the extent of \$1,860.48, with respect to Claim No. 2, and was denied or dismissed with respect to the remainder of the claims at issue.

Adequacy of Hearing

One ground for reconsideration advanced by appellant is that no hearing was afforded by the Board, since the oral argument was had before an individual member of the Board, who did not participate in the decision of the appeal, and since no transcript was made of the oral argument.

The hearing was conducted by the undersigned. A verbatim transcript of the testimony was made by a professional reporting service. Following the taking of the testimony, an oral argument was had before the undersigned. No verbatim transcript was made of the oral argument. However, while the argument was in progress the under-

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signed made written notes of the gist of what was being said, and these notes have been preserved as a part of the record of the appeal.

Due to other assignments, the undersigned did not participate in the determination of the appeal. The three members who did participate had before them the entire record. This included not only the appeal file, the transcript of the testimony, the exhibits, and the briefs submitted by counsel for the appellant and the Government, respectively, but also the notes of the oral argument taken down by the undersigned.

In the opinion of the Board the procedure thus followed fully satisfies the hearing requirements set out in the "Disputes" clause (Clause 6), of the General Provisions of the contract and in 43 CFR 4.10.¹ It is not at variance with anything stated in the *Morgan* decisions,² on which appellant relies.

Work Conditions on Monument Circle

Appellant asks for reconsideration of the portion of our decision that deals with Claim No. 1 on the ground that the Board erred in rejecting the three items of which this claim is composed. These items were rejected partly for lack of jurisdiction and partly for absence of substantive merit.

Two lines of argument for the allowance of Claim No. 1 have been urged by appellant. The first is that the Government failed to perform its contractual obligation of closing the Monument circle to vehicular traffic. The second is that the Government directed appellant to perform the portions of the contract work that would or could affect vehicular traffic on the circle in a sequence not required by the contract itself.

The first of these lines of argument seems to amount to the presentation of a claim for damages for breach of contract by the Government.³ This is a class of claims which neither the contracting officer nor the Board has authority to consider and adjust under a contract such as the one here involved. The second line of argument, however, seems to amount to the presentation of a claim for an equitable adjustment on account of a change in the specifications, within the meaning of the "Changes" clause (Clause 3) of the contract. If Claim No. 1

¹ See *Superior Magneto Corporation*, ASBCA No. 4130, 1 G.C. par. 670 (on motion for reconsideration, September 30, 1959); *Blount Brothers Construction Company*, ASBCA No. 4520, 1 G.C. par. 670 (on motion for reconsideration, September 24, 1959); *Eagle Lock Company*, ASBCA No. 1031 (on motion for reconsideration, March 17, 1954); *Univox Corporation*, ASBCA No. 1090 (on motion for reconsideration, August 3, 1953).

² *Morgan v. United States*, 298 U.S. 468 (1936); *Morgan v. United States*, 304 U.S. 1 (1938); *United States v. Morgan*, 307 U.S. 183 (1939); *United States v. Morgan*, 313 U.S. 409 (1941).

³ See *Gerhardt F. Meyne Company v. United States*, 110 Ct. Cl. 527, 549-50 (1948).

is, in truth, such a claim, then it would be within the authority of the contracting officer and the Board to consider and adjust. Even so, however, it would be subject to the application of the rule laid down in *United States v. Rice*, 317 U.S. 61 (1942), that to the extent a change has the effect merely of delaying the performance of work not otherwise altered, the equitable adjustment to be made under a "Changes" clause written in the terms of the one here involved is to consist of an extension of time only, and is not to include an increase in monetary compensation.

In *Utah Construction Company*,⁴ after examining numerous authorities which had been cited in support of the contention that the claims there asserted were allowable under the "Changes" clause, the Board stated:

Clause 3 was not designed as a mechanism for the adjustment of claims for breach of contract. It follows, therefore, that in order to bring successfully a claim within it, something more must be shown than a mere failure to perform a promise, covenant, warranty, or other obligation undertaken by the party against whom the claim is asserted. Furthermore, the clause is written in a form that provides for changes for which price adjustments may be made and changes for which only extensions of time may be allowed.

* * * * *

The Board has reviewed the cases which appellant's counsel cites as precedents for his contention that the contracting officer had authority to make, and should have made, an equitable adjustment in money on account of the circumstances just mentioned. Summarized generally, those cases involved situations where the Government authorized the contractor to render a performance which differed substantially in characteristics or amounts from that defined in the specifications and drawings, or where the Government took action that evinced an intention to amend the provisions of the specifications and drawings defining the performance to be rendered on its part. In those instances where a postponement of the time for performance of otherwise unchanged work was involved, such postponement was recognized as ground for an extension of time, but not for an equitable adjustment in money. (citations omitted).⁵

Appellant's contentions that all three items of Claim No. 1 are within our jurisdiction and allowable on their merits must be evaluated in the light of the general principles we have just outlined.

Stoppage of work. The first item is for the expense attributable to the cessation of excavation of the south floodlight vault on July 24, 1957, pursuant to the oral stop order given by the contracting officer's representatives on that day.

⁴ IBCA-133 and IBCA-140, 67 I.D. 248, 253-54, 60-1 BCA par. 2649, 2 G.C. par. 397 (June 10, 1960).

⁵ See also the precedents to the same effect cited in our original decision upon the present appeal, and *York Tabulating Service, Inc.*, IBCA-126, 65 I.D. 120, 58-1 BCA par. 1635 (March 7, 1953).

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One week before, at the conference on July 17, 1957, appellant had been informed that the Government wished appellant to construct the four floodlight vaults and the new guardroom in the order and at the time prescribed by the sequence of work which was later incorporated in the contracting officer's letter of July 24, 1957. The evidence leaves no doubt of appellant's complete awareness that the sequence of work outlined at the conference was intended to be a mandatory one, and that under it the excavation of the south vault would not be permissible until after September 15, 1957.

Appellant's position appears to be that it was at liberty to disregard the instructions thus orally communicated to it on July 17 until such time as they might be formally transmitted to it in writing. This, however, is not correct. The procedure to be followed by a contractor who is dissatisfied with oral instructions, or desires to claim additional compensation because of them, is spelled out in the "Protests" clause of the contract (Paragraph 2-10 of the specifications), as follows:

If the Contractor considers any work demanded of him to be outside the requirements of the contract, or considers any record or ruling of the Contracting Officer, or of the inspectors to be unfair, he shall immediately ask for written instructions or decision, and within ten (10) days after the receipt of the same he shall file a written protest with the Contracting Officer, stating clearly the basis of his objections. Unless the Contractor files protest as thus provided, he will be considered to have accepted the record or the ruling.

That appellant was fully cognizant of its rights and duties under the "Protests" clause is indicated by the fact that on July 24, immediately following the stoppage of work on the south vault, it sent the contracting officer a letter in which it specifically protested both that stoppage and the Government's failure to close the Monument circle to vehicular traffic, and requested "detailed written instructions to cover our future operations at the job site."

In the circumstances it was not permissible for appellant to disregard the oral instructions it had been previously given by starting the excavation of the south vault on July 24. Hence, even if it were to be assumed that those instructions amounted to a change, appellant would not be entitled to the allowance of an equitable adjustment on account of the stoppage of the work thus improperly begun.⁶ Under the contract an equitable adjustment is to be made for costs caused by a change, not for costs incurred in contravention of a change.

Flagman's Wages. This item of the claim is for the expense of hiring a flagman to direct vehicular traffic on the Monument circle, and also for the expense of moving equipment about in order to facilitate such traffic.

⁶ Cf. *J. A. Ross & Company v. United States*, 126 Ct. Cl. 323, 329-30 (1953); *Shepherd v. United States*, 125 Ct. Cl. 724, 735-36 (1953).

The measures so taken were not required by the original contract terms, and there is no evidence that any representative of the Government instructed appellant to adopt them. They cannot be viewed as having been caused by any of the Government's instructions concerning the sequence of work, for there would have been no need for them if the Government had kept vehicular traffic off the circle during the period while appellant was constructing the four floodlight vaults and the new guardroom under such instructions. Whatever need there was for these measures arose by reason of the Government's unwillingness to close the circle to vehicular traffic during the summer tourist season. The flagman was hired and the equipment moves made because of the presence of vehicular traffic, not because of the order in which or the time at which the vaults and the guardroom were constructed. Nor can it be said that adoption of these measures was compelled either by the failure to close the circle or by the instructions concerning sequence of work, for appellant had available to it the alternative of refraining from operations on the circle until after its expected closure on September 15, 1957.

While the action of a contracting officer in ordering a contractor to utilize a particular procedure, not required by the original contract terms, for the purpose of mitigating the consequences of a breach of contract by the Government may amount to a change,⁷ the action of a contractor in utilizing solely on its own initiative a like procedure for a like purpose does not amount to a change.

It is thus evident that this item of the claim does not spring from any change, but is an element of damage for an alleged breach of contract, and, hence, is a matter over which neither the contracting officer nor the Board would have jurisdiction.⁸

Prevention of Simultaneous Work. The third item of Claim No. 1 is for increased supervision expense attributable to the sequence of work prescribed by the Government. Appellant contends that observance of such sequence prolonged the performance period far beyond the time when the work would have been finished had the Government permitted it to pursue its original plan of constructing simultaneously the four floodlight vaults and the new guardroom. The amount of this item is based upon the wages paid by appellant to its supervisor, and by a sub-subcontractor or to its supervisor, during such alleged prolongation of the performance period.

The record fails to reveal any particular in which the prevention of simultaneous work affected the costs of the job other than by stretch-

⁷ *A. S. Horner Construction Co.*, IBCA-75, 63 I.D. 401, 404, 56-2 BCA par. 1115 (December 20, 1956); *Salem Products Corporation*, ASBCA Nos. 4320 and 4698, 58-2 BCA par. 1944 (September 29, 1958).

⁸ See *Central Florida Construction Company*, IBCA-246, 61-1 BCA par. 2903 (January 5, 1961).

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ing out its performance over a longer period and thereby adding to the supervision costs. Even if such stretching out were to be found to have been caused by a change, the rule expressed by the Supreme Court in *United States v. Rice, supra*, would preclude the allowance of a price adjustment therefor. Appellant has already received an adequate time adjustment, since the time extensions granted by the contracting officer are equal to the entire period by which appellant was late in finishing the job.

Counsel for appellant urges that the decision of the Comptroller General in the case *W. C. Spratt*⁹ is a precedent for our acceptance of jurisdiction over at least this item of Claim No. 1. There the Government directed a contractor to dig by hand certain ditches which the contract permitted to be dug by machine, and which the contractor would have dug by machine but for the fact that the Government had made the use of machines impractical by failing to perform its own contractual obligation of removing certain buildings from the job site. The Comptroller General held that additional compensation was payable for the increased costs incident to digging the ditches by hand, and explained this holding on the ground that the Government's conduct amounted to a change.

The *W. C. Spratt* decision, however, is not a precedent for allowing additional compensation merely for Government-caused delay in the performance of the contract work. The digging of the ditches was made more expensive because the manner, rather than the time, of digging them was altered. The instant case is different in that compliance with the Government's instructions concerning the sequence of work necessitated nothing more than the postponement to a later date of certain parts of the job. The four vaults and the guardroom were five physically separate units of work which, had they been constructed simultaneously, would nevertheless have been constructed, so far as the record shows, in the same manner in which they were actually constructed. This is borne out by the fact that the only additional expense which appellant claims to have incurred by reason of the prevention of simultaneous work is the increased supervision expense incident to the stretching out of the period of performance. In an appropriate case we would follow the *Spratt* decision, but we must also follow the *Rice* decision, and here it is clearly controlling.

Allowances for Overhead and Profit

A final ground for reconsideration advanced by appellant is that the Board erred in rejecting appellant's claims for overhead and

⁹ A-28145 (February 19, 1930), as cited and explained in 12 Comp. Gen. 179 (August 5, 1932).

profit allowances to its subcontractors and sub-subcontractors. This rejection was predicated on the terms of Paragraph 2-9 of the specifications as previously interpreted in *Irvin Prickett & Sons, Inc.*¹⁰

The reasons for reconsideration stated by appellant are essentially the same as those propounded in its earlier submissions to the Board. After examining them anew, we still are of the opinion that the terms of Paragraph 2-9 preclude the making of any allowances for overhead and profit other than the single allowance of 15% expressly provided for in that paragraph.

CONCLUSION

The motion for reconsideration is granted, and upon reconsideration the Board adheres to its original decision.

HERBERT J. SLAUGHTER, *Deputy Chairman.*

We concur:

THOMAS M. DURSTON, *Member.*

JOHN J. HYNES, *Member.*

AUGUST F. SCHEELE v. JOHNNY H. DOCKERY

A-28541

Decided March 30, 1961

Homesteads (Ordinary): Contests—Rules of Practice: Private Contests

Under the Departmental regulations governing private contests, a sufficient contest charge against a homestead entry must allege facts which, if proved, would require cancellation of the entry.

Alaska: Homesteads—Homesteads (Ordinary): Contests—Rules of Practice: Private Contests

An allegation in a private contest that a settler on unsurveyed land "has not posted his entry adequately for the public to be aware of it" and "has not blazed a trail or corner markers to said property" is a sufficient allegation that the settler has failed to mark the claim by permanent monuments at each corner as required by the statute authorizing settlement on unsurveyed land in Alaska.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

August F. Scheele has appealed to the Secretary of the Interior from a decision of the Director of the Bureau of Land Management dated June 3, 1960, which affirmed decisions of the land office at Anchorage, Alaska, dismissing the complaints in private contests filed by him against the homestead settlement claims of Johnny H. Dockery

¹⁰ IBCA-203, 67 I.D. 353, 60-2 BCA par. 2747, 2 G.C. par. 555 (September 23, 1960).

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and James E. Sullivan, respectively, under the act of March 3, 1903, as amended (48 U.S.C., 1958 ed., sec. 371 *et seq.*).

Dockery filed a notice of location of settlement on January 19, 1959, describing certain land which, when surveyed, will be located in section 30, T.18N., R.2W., Seward Meridian. He did not establish residence immediately.

Sullivan filed the same type of notice on March 13, 1959, describing certain land which, when surveyed, will be located in section 31, T.18N., R.2W., Seward Meridian. The notice states that he occupied or settled the land on March 7, 1959, but on September 3, 1959, he requested a 6-month extension of time to establish residence.

Scheele also filed a notice of location on June 12, 1959, describing certain land which, when surveyed, will be located in sections 30 and 31, T.18N., R.2W., Seward Meridian, which includes some, but not all, of the land described in Dockery's and Sullivan's notices. The notice states that he settled on or occupied the land on June 11, 1959, and that the improvements consist of a house, an outhouse, a jeep trail and a tent.

On June 22, 1959, Scheele filed complaints, alleging as to both the Dockery and the Sullivan entries that the entryman—

* * * has not posted his entry adequately for the public to be aware of it, he has not cleared, cultivated, built any type of residence or blazed a trail or corner markers to said property and on the 10 day of June 1959 I personally escorted the below-named persons to said entry to examine the land and bear witness to the fact that no effort whatever has been made to occupy or appropriate means of residency on the land.

With the complaints, he filed affidavits detailing the inability of several persons to discover signs of staking or occupancy of the Dockery and Sullivan entries.

On July 22, 1959, the land office dismissed the complaints as insufficient to initiate a private contest for want of a clear and concise statement of the facts constituting the grounds of contest. The Director affirmed on appeal.

The Department's rules of practice provide that a contest complaint must contain

A statement in clear and concise language of the facts constituting the grounds of contest. (43 CFR, 1959 Supp., 221.54(d)).

and that:

If a complaint when filed does not meet all the requirements of §§ 221.54 and 221.56 * * * the complaint will be summarily dismissed by the manager and no answer need be filed. (43 CFR, 1959 Supp., 221.59.)

In his appeal to the Secretary of the Interior, Scheele argues that his complaints are proper and that he has complied with the require-

ments of the homestead law, and attempts to show want of compliance by Dockery and Sullivan. The issue presented by the appeal, however, is only whether the contests against the homestead entries were properly dismissed.

The act of March 3, 1903, authorizes the initiation of homestead entries in Alaska on either surveyed or unsurveyed land by settlement on the land, followed by residence, improvements and cultivation in accordance with the requirements of the homestead law. If the land is unsurveyed, the entry must be located in a rectangular form not more than one mile in length and bounded by north and south lines run according to the true meridian and "marked upon the ground by permanent monuments at each of the four corners." The entryman is required to file a notice showing the location of his homestead (48 U.S.C., 1958 ed., sec. 371).

The language in Scheele's complaints seems to suggest two deficiencies in the entrymen's compliance with the homestead requirements: first, that they had not posted the entries properly and, second, that they were not in residence upon the land.

If Scheele's language was intended to constitute a charge of an absence of any residence on the entries, it is sufficient to point out, as the land office did, that the departmental regulations require of a homestead entryman who initiates his homestead claim under the act of March 3, 1903, as amended (*supra*), only that he establish residence upon the land within 6 months after the date of the recording of the location notice (43 CFR 65.15). Since the period for establishing residence had not run in either case, the charge would have been without significance even if it had been clear.

However, the allegations that neither Dockery or Sullivan properly posted the land or blazed corner markers, while a bit imprecise, raised the issue of whether they had erected permanent monuments at each of the four corners of their claims with sufficient clarity to inform the entrymen of the grounds on which their entries were being challenged. Thus, I conclude that Scheele's complaints met the requirements of the rules of practice. Cf. *Earl D. Deater v. John C. Slagle*, A-28121 (May 24, 1960).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management is reversed.

EDWARD W. FISHER,
Deputy Solicitor.

APPEAL OF BARKLEY PIPELINE CONSTRUCTION, INC.**IBCA-264***Decided April 6, 1961***Contracts: Appeals—Contracts: Contracting Officer**

Where letters received from a contracting officer are appealed from, and such letters do not dispose finally of pending claims and do not contain such language as will fairly and reasonably inform the contractor that decisions under the "Disputes" clause are intended, the appeal will be remanded to the contracting officer for decision.

Rules of Practice: Appeals: Effect of

Additional claims first presented in appellant's brief are outside the jurisdiction of the Board, and will be remanded to the contracting officer for decision.

Contracts: Contractor—Rules of Practice: Appeals: Dismissal

An appeal will not be dismissed for technical defects consisting of the inadvertent omission of the corporate name of the contractor in the appeal papers and the substitution therefor of the name of the contractor's representative and employee.

BOARD OF CONTRACT APPEALS

The Government has moved to dismiss the above-captioned appeal on two grounds, (1) "The appellant appears to be either Pat Barkley or James P. Barkley, neither of whom specifies that he is acting for or in behalf of the contractor, Barkley Pipeline Construction, Inc.," and (2) "The appeal is premature because there has been no decision or findings of fact issued by the contracting officer concerning any of the matters contained in the appeal."

The first ground on which dismissal is urged is a mere technicality. The formal notice of appeal dated January 18, 1961, is signed "Pat Barkley Contractor's Representative," although the caption of the form purports to identify James P. Barkley as the contractor. Pat Barkley and James P. Barkley are "one and the same person, who is the contractor's authorized agent * * *" according to the reply brief on the corporate contractor's letterhead, dated March 20, 1961, signed simply "James P. Barkley."

"James P. Barkley" or "Pat Barkley" appears to have signed all of the letters on the letterhead of the contractor, to the contracting officer, without objection by the latter. Though Mr. Barkley, by reason of his ostensible authority to deal with the Government, apparently considers it unnecessary to use the name of the Barkley Pipeline Construction, Inc., such inadvertent and innocent substitutions of his name for that of the corporation will not defeat the appeal, absent a showing that the corporate contractor has denied his ostensi-

ble authority to take an appeal in its behalf. "The Board will jealously watch that substantive rights of the parties are not defeated by mere technicalities."¹ The fact that appellant is not represented by counsel reinforces the Board's attitude in such matters.

Ground No. 2, that the appeal is premature, presents a more difficult problem. However, two new claims are set forth for the first time in the contractor's brief dated January 18, 1961, and have not previously been presented to the contracting officer for decision. These claims consist of requests for additional compensation for (1) alleged costs amounting to two-thirds of the cost of operations due to reduced work efficiency because of inclement weather, from the date of the first snowstorm on November 3, 1960, to December 2, 1960, as set forth in the summary on page 4 of appellant's brief, and (2) costs amounting to 50% of payroll for one week due to delay alleged to have been occasioned by the refusal of the contracting officer to permit backfill of the pipeline under an access road as the work progressed, and to permit tests of the entire system at one time, after completion, as set forth in the summary, attached to the contractor's letters of October 25 and November 7, 1960.

Prior to assertion of these claims for additional compensation, the contractor had asked the contracting officer only for stop orders and extensions of time related to the inclement weather and the backfill request. These original requests, if granted, would have mitigated possible charges of liquidated damages for inexcusable delay. The additional claims for compensation are, therefore, clearly premature. It has been held that additional claims, presented for the first time in appellant's brief,² without findings and decisions of the contracting officer, are outside the jurisdiction of the Board.³

This rule affords a measure of protection to the contractor as well as to the Government, for, if the questions were not raised until a hearing were taking place, the contractor could be subjected to the additional expense of another hearing. No hearing has been requested in this appeal, but if the entire appeal should be decided on the record without a hearing, and without the instant motion, there would be at least a considerable delay because of the necessity of

¹ *Henkle and Company*, IBCA-212 (September 15, 1959), 66 I.D. 331, 59-2 BCA par. 2331, 1 Govt. Contr. par. 652. *Cf. Monarch Lumber Co.*, IBCA-217 (May 18, 1960), 67 I.D. 198, 60-2 BCA par. 2674, 2 Govt. Contr. par. 290; *Cheney-Cherf and Associates*, IBCA-250 (November 14, 1960), 67 I.D. 396, 400, 2 Govt. Contr. par. 620(a).

² *Cf. General Excavating Co.*, IBCA-150 (May 25, 1959), p. 4, 59-1 BCA par. 2190, 1 Govt. Contr. par. 428. In *Holly Corp.*, ASBCA No. 3626 (June 30, 1960), 60-2 BCA par. 2685, 2 Govt. Contr. par. 417, and *La Voie Laboratories, Inc.*, ASBCA No. 3796 (January 8, 1959), 59-1 BCA par. 2071, 1 Govt. Contr. par. 175, the same result was reached concerning claims first presented at a hearing on the appeal, or on motion, respectively.

³ *Tri-State Construction Co.*, IBCA-63 (February 26, 1957), 64 I.D. 38, 44.

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remanding such new claims to the contracting officer for findings and decisions, subject to further appeal.

Concerning those matters which were presented to the contracting officer, we are of the opinion that the decisions involved did not speak with the finality necessary to constitute final decisions from which appeals must be taken. The National Park Service Handbook entitled "Procurement and Contracting, Part II, Construction Contracts," contains no explicit instructions concerning language to be used in final decisions, but refers to a publication of the Bureau of Indian Affairs for guidance. The latter publication enjoins contracting officers to include in such decisions a paragraph calling the attention of the contractor to his right to appeal. No such paragraph appears in these letters, and they do not inform the contractor that decisions under the "Disputes" clause are intended.⁴

In the final paragraph of his letter of December 8, 1960, the contracting officer informed the contractor that, with respect to its request of November 12, 1960, for a stop order effective November 3, 1960, and as to the previous stop order which was effective November 23, 1960, " * * * we are amending our stop order as of the close of work on November 18, 1960 to give you equivalent working time." This letter clearly did not preclude further discussion of the contractor's request for a stop order effective November 3, 1960.

The contractor's letter of November 7, 1960, requests an extension of time throughout the winter months (if necessary), due to the late start in performance of this contract, which the contractor alleges was due to erroneous information given to him by the Government concerning the award of another contract. There does not appear to be any reply to the contractor's letter of November 7, 1960. It is not mentioned in the contracting officer's letter of December 8, 1960. Presumably the request was granted and the job was shut down for the winter on December 2, 1960, since the claim for reduced work efficiency, *supra*, is limited to that date.

In its letter of November 5, 1960, the contractor requests a change order to cover 8 alleged changes in the pipelines and for relocation of certain other structures, as well as an extension of twenty days because of such changes and because of difficulties in testing the waterline prior to backfilling. In his reply of December 9, 1960, the contracting officer says, in pertinent part, with respect to the changes made in the pipeline:

⁴ *Central Wrecking Corporation*, IBCA-89 (March 29, 1957), 64 I.D. 145, 57-1 BCA par. 1209.

* * * It is true that sometimes the depths were increased a small amount, but in other places the cuts are smaller. In general, we feel that one will pretty well balance the other, and that you do not have any additional money coming from the line changes as far as the pipe line is concerned.

As to relocation, the contracting officer says:

The tank relocation is definitely more accessible than the location shown on the working drawings. It also saved you from removing four trees.

Concerning the alleged increase in length of the drain line from the water tank from 100 to 140 feet:

* * * Mr. Pat Barkley was instructed * * * verbally on October 14, 1960 to stop the drain 120 feet from the manhole. * * * This is part of the lump sum bid for the tank and no separate payment is justified. The plans call for approximately 100 feet of line, and we consider 120 feet to be approximately 100 feet.

In this same letter, concerning the contractor's request of October 25, 1960, for adjustments due to alleged changes in pipe flanges, etc., the contracting officer states, in pertinent part:

* * * We will not pay the freight costs or handling charges for you to ship a few extra fittings away from the job.

Also:

* * * If you backfilled any lines before this time, [testing] you are responsible to make any corrections without cost to the Government. (Items II 1 and 2)

* * * As there was actually a small reduction in the length of the pipelines from those shown on the plans and that the specifications call for the testing of the lines prior to backfilling, we see no justification for the twenty day extension in your contract time. However, a concession in time is being made in changing our stop order to close of business on November 18, 1960. See our letter of December 8, 1960.

The contractor appealed by letter dated December 16, 1960. If the shoe were on the other foot, and the Government were contending that these were final decisions under the "Disputes" clause, from which the contractor had not taken a timely appeal, we would hold for the contractor, as we have in similar cases.⁵ We perceive no reason for being inconsistent with those rulings in this case.

CONCLUSION

The appeal is remanded to the contracting officer for prompt issuance of, and furnishing to the contractor, Findings of Fact and Decision concerning the claims of the contractor as stated in its letters dated November 12, 1960, November 7, 1960 and summary at the end thereof, November 5, 1960 and summary attached thereto, October 25, 1960, November 7, 1960 and summary following, November 7,

⁵ *General Excavating Company*, IBCA-188 (September 21, 1960), 67 I.D. 344-347, 60-2 BCA par. 2771, 2 Govt. Contr. par. 539; *Central Wrecking Corporation*, fn. 4, *supra*.

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1960 (Water Tank) and summary attached thereto, copies of which letters were included in its brief attached to its formal notice of appeal dated January 18, 1960. The contractor may then appeal further if he so desires.

THOMAS M. DURSTON, *Member*.

We concur:

PAUL H. GANTT, *Chairman*.

JOHN J. HYNES, *Member*.

APPEAL OF WELDFAB, INC.

IBCA-268

Decided April 11, 1961

Contracts: Appeals—Rules of Practice: Appeals: Dismissal

Board will not dismiss appeal in situations where action of appellant does not indicate an intention to abandon appeal, and issues are determinable from notice of appeal, findings of fact and decision of contracting officer, claims of appellant and evidence submitted by it prior to contracting officer's decision.

BOARD OF CONTRACT APPEALS

On January 30, 1961, appellant filed directly with the Board¹ a timely appeal from the decision and findings of fact of the contracting officer of January 10, 1960. The appeal was routed by the Board to the proper channels.

On April 4, 1961, Department Counsel moved to dismiss the appeal because appellant failed to "specify the portion of the findings of fact or decision from which the appeal is taken, and the reasons why the findings or decisions are deemed erroneous."²

The Department Counsel further states in the motion as follows:

4. By certified mail dated March 7, 1961, the contractor was furnished a copy of the appeal file, and at that time was advised that a motion to dismiss the appeal would be filed unless the contractor complied with the regulations and specified the part of the findings or decision which are deemed erroneous.

5. By telegram received March 30, 1961, the contractor advised that it feels "sufficient evidence has been forwarded to your office [of the Department Counsel] for evaluation of our claim."³

The notice of appeal utilizes the suggested form which appears as Appendix I to the rules governing the procedures before the Board, immediately following 43 CFR 4.16.

¹ While the notice of appeal should have been transmitted through the contracting officer, this defect is not jurisdictional and, in the absence of any grounds for considering that the Government may have been prejudiced thereby, is not a sufficient reason for dismissing an appeal in the circumstances here involved. *Bushman Construction Company*, IBCA-193 (April 23, 1959), 66 I.D. 156, 157; 59-1 BCA par. 2148, 1 Govt. Contr. 312, 319, 324, 674N, citing *Larsen-Meyer Construction Company*, IBCA-85 (November 24, 1958), 65 I.D. 463, 465, 58-2 BCA par. 1987.

² 43 CFR 4.5.

³ The telegram was addressed to the Department Counsel. It reads, in part, as follows:

It is true that appellant has not expressly stated any "specific circumstances and the contractual provisions involved." But the Board interprets the telegram of the appellant which is set forth in footnote 3 as making his prior claims and submitted evidence part of the appeal.

Appellant is not represented by counsel.

The cases cited by Department Counsel are not apposite to the instant situation. In *Henkle and Company*,⁴ the Board found that the appellant "abandoned its appeal," and there was "complete inaction and silence on the part of the contractor for a considerable period of time." In *L. N. & R. Corporation*,⁵ appellant, represented by counsel, stated that "additional facts and details * * * will be submitted by following separate letter. No additional material of any kind was submitted, and neither appellant nor its counsel opposed the motion to dismiss." Consequently, the Board concluded that the appellant abandoned its appeal. The further cases, *Raymond J. Hansen*, A-28582 (September 29, 1960); *Grover D. Barton*, A-28404 (September 19, 1960); and *James D. Williams*, A-28522 (October 3, 1960), do not concern contract appeals, but land appeals under different rules of practice.

Thus, the instant motion falls within the compass of our decision in *General Excavating Company*, IBCA-188 (August 15, 1960), where we stated:

Appellant, on the other hand, has not submitted any statement to the Board except the appeal letter of December 22, 1958. That appeal letter, when read together with the claim of appellant meets the minimum requirement of the notice of appeal. The Armed Services Board of Contract Appeals considered the appeal of *George C. Tapper Company* [ASBCA No. 5371, July 14, 1960; cf. *Whyte Construction Company*, IBCA-204 (October 3, 1960)] on the record, despite the fact that no complaint was filed, and despite the fact that appellant was "notified on three different occasions of the requirement for the filing of a complaint."

For the reasons stated above, the motion to dismiss is denied.

PAUL H. GANTT, *Chairman*.

We concur:

THOMAS M. DURSTON, *Member*.

JOHN J. HYNES, *Member*.

"Ref is made to our telephone conversation at which the writer indicated the position taken by Weldfab regarding the above claim. Weldfab feels that sufficient evidence has been forwarded to your office for evaluation of our claim. We do not deem it necessary to appoint an attorney regarding this matter. We would appreciate your office giving us a fair evaluation of the evidence submitted and will abide by its finding."

⁴ IBCA-212, September 15, 1959, 66 I.D. 331, 59-2 BCA par. 2331.

⁵ IBCA-201, September 21, 1960.

APPEAL OF PRODUCTION TOOL CORPORATION

IBCA-262

Decided April 17, 1961

Contracts: Appeals—Contracts: Contracting Officer

Where a letter from a contracting officer does not finally dispose of pending claims and does not place the contractor on notice that a decision under the "Disputes" clause is intended, an appeal taken from such letter will be remanded to the contracting officer for issuance of findings of fact and decision.

Rules of Practice: Appeals: Effect of

Additional claims as to furnishing of notice by contractor, first presented after appeal and not considered by contracting officer, will be remanded to contracting officer for issuance of findings of fact and decision.

Contracts: Notices—Rules of Practice: Evidence—Rules of Practice: Appeals: Dismissal

There is a strong presumption that a notice by mail, properly stamped, addressed and mailed, was received by the addressee. Denial of receipt by the Government does not successfully rebut such presumption, but creates an issue of fact, requiring denial of a motion to dismiss the appeal.

BOARD OF CONTRACT APPEALS

Department Counsel in his Statement of Government's Position and Motion to Dismiss, dated February 6, 1961, as supplemented on March 28, 1961, has moved for dismissal of this appeal on two grounds, namely:

1. That the contractor failed to give timely notice of the cause of delay, as provided by Paragraph B-8 of the invitation for bids.
2. That the appeal was not timely filed.

Paragraph B-8 reads as follows:

Provided further, that the contractor shall not be charged with liquidated damages when the delay in shipment is due to excusable causes as defined above in Subparagraph (c) of this clause, if the contractor shall notify the contracting officer in writing of the cause of any such delay, within 30 days from the beginning thereof, or *within such further period as the contracting officer shall, prior to the date of final settlement of the contract, grant for the giving of such notice.* (Emphasis added.)

It is the position of the Government that the date of final settlement was July 1, 1960, when the final payment voucher was approved by the contracting officer, or at the latest, July 12, 1960, when final payment was made. The contractor protested the deduction of liquidated damages of \$2,720.00 by letter of August 5, 1960, describing the development of the steel strike in 1959 as one of the principal causes of delay. The Government claims that this letter of August 5, 1960, was

the first notice received from appellant concerning any excusable cause for delay.

The contractor has since produced (with its letter of February 27, 1961), copies of letters to the contracting officer, dated June 23, 1959 and September 17, 1959. The Government has denied, through Department Counsel, that it ever received the originals of these two letters. The letter of June 23, 1959, is clearly a notification of delay due to the impending nationwide steel strike, and attaches a copy of a letter dated June 18, 1959, from a supplier, to the effect that deliveries of stainless steel and naval bronze cannot be made prior to October 1, 1959. The required contract completion date was August 8, 1959. It was actually completed December 22, 1959.

Department Counsel cites the case of *Rhode Island Tool Company v. United States*, 130 Ct. Cl. 698 (1955), for the proposition that the date of receipt of acceptance of a bid rather than the date of mailing of such acceptance, is controlling as to the consummation of the contract. We do not consider that decision to be pertinent to this case, which involves a question of fact as to whether a letter was delivered at all, rather than a question of law as to whether the date of mailing or the date of delivery of a letter is controlling.

To make the distinction in another manner, if the contractor's letter of June 23, 1959, had not been delivered to the contracting officer until July 13, 1960, the *Rhode Island Tool Company* case might be applicable.

Generally, and in nearly all American jurisdictions, there is a strong presumption that mail matter, proven to have been properly addressed, stamped and mailed, was received by the addressee.¹ This presumption is strengthened by a showing that such mail was not returned to the sender, although the envelope bore the return address of the sender.² Also, the fact that other letters, addressed in the same way, were delivered, is for consideration in the rise of the presumption.³ Furthermore, it is widely held that denial of receipt of mail does not successfully rebut the presumption, but creates an issue of fact.⁴

¹ 31 C.J.S. Evidence Sec. 136a (See extensive list of cases cited under note 60, p. 777); *Emsco Manufacturing Company*, IBCA-66 (April 6, 1956), 63 I.D. 92, 95.

² *Columbia Finance Company v. Worthy*, 141 A. 2d 185-87 (D.C. Mun. App. 1958).

³ *W. E. Richmond & Company v. Security National Bank*, 64 S.W. 2d 863-69, 16 Tenn. App. 414 (1933).

⁴ *General Motors Acceptance Corporation v. American Insurance Company*, 50 F. 2d 803 (Fla. Cir. 1931), cert. denied, 284 U.S. 676 (1931); *Loving v. Allstate Insurance Company*, 17 Ill. App. 2d 230, 149 N.E. 2d 641-44 (1958); *First National Bank of Denver v. Henning*, 112 Colo. 523, 150 P. 2d 790-94 (1944).

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There being a substantial issue of material fact concerning the furnishing of the notice of delay, the appeal will not be dismissed on motion.⁵

The second ground urged for dismissal is that the appeal was not timely filed. The contracting officer, in his letter of August 29, 1960, replied to the contractor's letter of August 5, 1960, by saying that that letter was the first notice given by the contractor as to the cause of delay. In the next paragraph the contracting officer quotes the contract requirements for notice of delay, and the final paragraph of the contracting officer's letter (which has been alleged to be his decision for the purpose of this appeal), reads as follows:

Final payment on this contract was made to you on July 12, 1960, as indicated by the date shown by the Regional Disbursing Officer on the final payment voucher. Since you did not notify us that you had been delayed by causes which you believe to be excusable, within 30 days from the beginning of such delays or before final settlement was made, I have no authority under the contract to consider the excusability of the delays as a basis for extending the contract period. This situation developed even though my letters of May 8, 1959, and August 18, 1959, referred you to Clause 11 of the contract provisions regarding extensions of the contract period, in the event excusable delays had been encountered.

The contractor had far exceeded the maximum of 30 days for filing a notice of appeal when it replied by letter of December 7, 1960, asking that the contracting officer " * * * forward necessary forms and information so that we may enter a formal appeal. * * * "

By letter of December 30, 1960, the contracting officer acknowledged receipt of the contractor's letter of December 7, 1960, and states " * * * I have treated your letter as a notice of appeal and have notified the Interior Board of Contract Appeals to that effect. * * * I am enclosing a suggested form for an appeal and a copy of the Regulations of the Interior Board of Contract Appeals."

We need not be concerned here with the question of whether the contractor's letter of December 7, 1960, was timely, or whether it constituted a proper notice of appeal, since it is fairly obvious, in our opinion, that the contracting officer's letter of August 29, 1960, did not constitute a decision under Clause 12 "Disputes." The rules and the customary practice followed by the Bureau of Reclamation require much more formality, including findings of fact, and identification of

⁵ Cf. *Cheney-Cherf and Associates*, IBCA-250 (November 14, 1960); 67 I.D. 396, 80-2 BCA par. 2853, 2 Govt. Contr. par. 620 (a); *Monarch Lumber Company*, IBCA-217 (May 18, 1960), 67 I.D. 198, 203, 60-2 BCA par. 2674, 2 Govt. Contr. par. 290.

the decision as a final decision, as well as a paragraph directing the attention of the contractor to his right to appeal within 30 days.⁶

Under these circumstances, we find that the letter of August 29, 1961, was not designed as a final decision under the "Disputes" clause.⁷

In addition, the contractor did not produce or make claim concerning his letters of June 23, 1959, and September 17, 1959, until February 27, 1961, or after the so-called appeal was taken. It follows that there could be no findings or decision involving that new evidence, as has been suggested by Department Counsel.⁸

CONCLUSION

The appeal is remanded to the contracting officer for prompt issuance of, and for furnishing to the contractor, Findings of Fact and Decision as to the claims of the contractor as described in its letters dated August 5, 1960, and attachments, and February 27, 1961, with attachments. The contractor will have a further right of appeal within 30 days (as to which no extensions may be granted), after receipt of the contracting officer's Findings of Fact and Decision.

THOMAS M. DURSTON, *Member*.

We concur:

PAUL H. GANTT, *Chairman*.

JOHN J. HYNES, *Member*.

⁶ "Reclamation Instructions," Part 176 "Contract Administration," paragraphs 176.4.4, 176.4.4A(7), 176.4.4B. A sample format of findings of fact is illustrated at Figure 6.

⁷ *Bostwick-Batterson Company v. United States*, Ct. Cl. No. 305-58 (December 1, 1960), 3 Govt. Contr. par. 112, 113; *Keystone Coat & Apron Mfg. Corporation v. United States*, Ct. Cl. No. 524-56 (June 8, 1960); *Barkley Pipeline Construction, Incorporated*, IBCA-264 (April 6, 1961); *Refer Construction Company*, IBCA-209 (October 20, 1960), 67 I.D. 457, 60-2 BCA par. 2831, 2 Govt. Contr. par. 561; *Central Wrecking Corporation*, IBCA-69 (March 29, 1957), 64 I.D. 145, 57-1 BCA par. 1209; *Gila Construction Company*, IBCA-79 (September 21, 1956), 63 I.D. 378, 56-2 BCA par. 1074; *Curtiss-Wright Corporation*, ASBCA No. 6274, 61-1 BCA par. 2861, 3 Govt. Contr. par. 113 (1961).

⁸ *Barkley Pipeline Construction, Incorporated*, Fn. 7 *supra*; *Tri-State Construction Company*, IBCA-63 (February 26, 1957), 64 I.D. 38, 57-1 BCA par. 1074; *Wonder Fashions, Incorporated*, ASBCA No. 4140 (February 15, 1961); *La Voie Laboratories, Incorporated*, ASBCA No. 3796 (January 8, 1959), 59-1 BCA par. 2071, 1 Govt. Contr. par. 175.

*April 18, 1961***CLAIM OF ALBIN D. MOLOHON****TA-213***Decided April 18, 1961***Torts: Animals and Livestock**

The United States is not liable for the death of trespassing animals from poison on private premises, where the poison was intended for the eradication and control of predatory animals, and the Government personnel did not distribute the poison in a willful or reckless manner.

APPEAL FROM ADMINISTRATIVE DETERMINATION

Mr. Albin D. Molohon, 2224 Lougee Street, Billings, Montana, has filed a timely appeal from an administrative determination (T-D-B-41) of January 10, 1961, by the Field Solicitor, Billings, Montana, which denied his claim in the amount of \$2,500 for the death of two Brittany Spaniels allegedly resulting from the consumption of compound 1080 (sodium fluoroacetate) placed in an animal carcass by an employee of the United States Fish and Wildlife Service upon privately owned land of Henry Algra in Petroleum County, Montana.

The Field Solicitor denied the claim on the grounds that the loss of property complained of was not the result of any negligent act or omission of an employee of the Department of the Interior; and that under the circumstances and the laws of Montana, the Government, if a private person, would not be liable for the loss complained of.

On November 19, 1960, the appellant, while driving on the Winnett Road in Petroleum County, Montana, about 27 miles, northeast of Roundup, Montana, entered the property of Andrew Iverson, allegedly with permission of the owner, to exercise his dogs and to do some hunting. The Algra property lies west of the Iverson property. A division fence extending north and south separates the properties. Both properties are bounded on the north by a County gravel road extending east and west. The appellant entered the Iverson property from the Winnett Road through a gate approximately 4,244 feet east of the division fence of both properties. Approximately one-half of this distance from the gate on Winnett Road a trail leads to some haystacks. There is no evidence of a trail from the haystacks west to the fence. There is a gate in the division fence at this point. The dogs were turned loose after entering the Iverson property. It appears that the dogs were out of appellant's sight for a short time. However, when he whistled for them, they returned from the adjacent enclosed property of Henry Algra. After the appellant left the Iverson property, the dogs became ill and subsequently died.

68 I.D., No. 5

A carcass of an animal treated with compound 1080 was placed on the property of Henry Algra by an employee of the Fish and Wildlife Service in accordance with a request of the property owner to protect his sheep from coyotes. The program for the eradication and control of predatory and other wild animals is conducted under the authority of the Act of March 2, 1931 (46 Stat. 1468, 7 U.S.C., 1958 ed., section 426).¹ The bait was placed on the Algra property, 2,022 feet south of the main entrance to this property from the County gravel road and 174 feet west of the division fence of both properties. A warning sign was posted at the entrance to the Algra property at the County gravel road.

In his notice of appeal of January 25, 1961, the appellant predicates his appeal on the grounds that the Field Solicitor erred in determining that the appellant and his dogs were in trespass on the Algra property; that the land in question was well known as a popular bird hunting area; that Government personnel were negligent in placing the bait; and that the determination is contrary to the law inasmuch as the Field Solicitor ignored the decision rendered in *McLaughlin v. Bardsen*, 145 Pac. 954 (Mont. 1915).

The holding in *McLaughlin* is distinguishable. The landowner, therein, was charged with knowledge that trespassers were using his property because over a period of years they had made a well-defined path on the property. In excavating a trench across such path and not giving warnings the landowner's action amounted to wanton or "reckless disregard for the safety of others." In the instant claim the appellant has not shown that the landowner had knowledge or had tolerated hunters on his property. Although the claimant asserts in his letter of December 5, 1960, that "while on said premises with the consent of those persons in possession thereof," it does not appear that such consent was asked of, or obtained from, Mr. Algra.

In a statement of December 12, 1960, Mr. Algra stated:

Mr. Molohon never came to my place and asked permission to hunt on my land. If he would have come to me and asked permission I would have told him of the poison.

¹ The Act provides: "The Secretary of Agriculture is authorized and directed to conduct such investigations, experiments, and tests as he may deem necessary in order to determine, demonstrate, and promulgate the best methods of eradication, suppression, or bringing under control on national forests and other areas of the public domain as well as on State, Territory, or privately owned lands of mountain lions, wolves, coyotes, bobcats, prairie dogs, gophers, ground squirrels, jack rabbits, and other animals injurious to agriculture, horticulture, forestry, animal husbandry, wild game animals, fur-bearing animals, and birds, and for the protection of stock and other domestic animals through the suppression of rabies and tularemia in predatory or other wild animals; and to conduct campaigns for the destruction or control of such animals: *Provided*, That in carrying out the provisions of this section the Secretary of Agriculture may cooperate with States, individuals, and public and private agencies, organizations, and institutions." The functions of the Secretary of Agriculture were transferred to Secretary of the Interior by Reorganization Plan No. 11 of 1939 (53 Stat. 1431).

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The record also shows that the Federal employee posted a warning sign on the gate at the County gravel road where normal access was to be anticipated to that portion of Mr. Algra's property.

On February 15, 1961, appellant, through his attorney, Peder Moe, Jr., Esq., of Billings, Mont., submitted a memorandum of law stating:

In applying the law to the above claim, we ask the solicitor to consider the line of authorities which impose liability upon a landowner or persons acting through his authority in cases where animals, though in technical trespass, are injured upon his premises where an element of enticement or attractive nuisance is present.

The case of *Beinhorn v. Griswold*, 27 Mont. 679, 69 p. 557, which is the prime basis for the field solicitor's decision in this case, recognizes that the element of invitation, enticement, allurement or attraction would require a different approach. The court in this case said, at page 560 of the Pacific Reports, as follows:

"We think there is no proof in the record which justifies the application of the doctrine of invitation, enticement, allurement, or attraction. * * * The soundness of the principles upon which the so-called turntable and similar cases are supported is not presented for decision."

It is recognized in a number of jurisdictions that a landowner or persons "standing in his shoes" may be liable to animals injured while trespassing on his land where the animals are lured on these premises by an attractive condition placed by the landowner or someone acting for him.

Appellant has cited various authorities from other jurisdictions which impose liability under the theory of enticement or attractive nuisance. Appellant has not submitted, nor have we been able to find, any Montana cases directly on point. This doctrine was not considered in the *Beinhorn* case because there was no evidence of record justifying its application.

Under the Federal Tort Claims Act² the United States is liable for loss of property caused by "the negligent or wrongful act or omission" of its employees in those circumstances where a private person would be liable for such loss in accordance with the law of the place where the act or omission occurred. Hence, this claim must be determined under the law of Montana.

The law concerning liability for injury to animals trespassing on premises of another is well settled in the State of Montana. It is in accord with the general rule as set forth in 2 *Am. Jur. Animals* section 122, page 782 (1936):

The owner of land, enclosed or unenclosed, is not in general bound to keep his premises safe for the trespassing animals of others. If, in the ordinary use of the property, harm befalls them, their owner, by permitting them to roam at large, is held to have assumed the risk of such injury, and so is denied any right of action on that account. This rule applies to livestock which stray from a public range. It seems that it is, generally speaking, immaterial whether or not the common-law rule as to keeping animals from straying is in force, since

² 28 U.S.C. 1958 ed., sec. 2671 et seq.

where the rule permitting animals to roam is in operation, it has no greater effect than to exempt the owner from liability for their trespasses, and does not ordinarily make their entry on unfenced lands lawful so as to render the landowner liable for injury to them not wantonly or intentionally inflicted, and arising from dangerous places or substances existing on his land.

In support of this text, *Beinhorn v. Griswold*, *supra*, is cited. In that case, cattle wandered on defendant's unenclosed property and drank from an uncovered container containing a chemical, resembling water and consisting primarily of cyanide potassium, which was used in mining operations. It was held that the defendant was not liable as long as he refrained from intentional or wanton injury.

It is recognized in some jurisdictions that, although a possessor of land is not bound to keep his premises safe from trespassing animals, he is nevertheless bound to exercise reasonable care and prudence where animals may be enticed or lured on the land. This is apparently the theory of appellant's case.

The cases cited by appellant have been examined. They are distinguishable from the instant claim. In them, the landowners were charged with knowledge that the poison was placed where animals were known to congregate or the poison was placed near highways. 2 *Am. Jur. Animals* section 123, page 785 (1936) states that the enticement or attractive nuisance doctrine has been invoked in the following situations:

It is to be observed, however, that in most of the cases where this principle is applied, * * * the dangerous excavations for injuries from which the landowner was held responsible were usually immediately adjacent to a highway and in a place which the owner knew was frequented by stock running at large, or were, in effect, baited by the presence thereabouts of corn or other substance attractive to cattle and naturally calculated to lure them into danger * * *. Liability in this class of cases may be based on negligence, which is determined by the question whether or not a person exercising reasonable care and prudence would apprehend injury to animals by reason of the character of the attraction, erection, or excavation.

The facts in the instant claim are not analogous to situations where the attractive nuisance doctrine has been invoked.

Generally, a landowner has no right unnecessarily to kill trespassing animals by deliberately putting out poisoned food, but where the poison is for another purpose the landowner is not liable. The rule in this respect is stated in 3 *C.J.S. Animals* section 213, page 1330 (1936), as follows:

An owner is not liable for death to trespassing animals from poison on his premises where the poison was intended for another purpose, and he was not guilty of gross or wanton negligence.

See *Lenk v. Spezia*, 213 P. 2d 47 (Calif. 1949); *Jeanes v. Holtz*, 211 P. 2d 925 (Calif. 1949); *Louisville & N.R. Co. v. Gillespie*, 172 S.W. 2d 1015 (Tenn. 1943).

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This Department has held that the duty owed by the Government to the owner of an animal is to avoid injuring it willfully or recklessly. *E. Pennington*, TA-201 (September 14, 1960); *John B. Hughes*, T-714 (May 24, 1955); *John W. Murphey and Winston Wheeler*, T-626 (April 20, 1954); *E. I. Sheffield*, T-145 (February 1, 1949). The appellant has not shown that the killing of his dogs was committed in a willful or reckless manner or with deliberate intent. Nor does the record support such a conclusion.

In the absence of statutory imposition, recovery for property damage resulting from insecticide or vermin operations conducted by the Government generally have been denied. *Annot.*, 25 A.L.R. 2d 1057 (1952).

From a careful reading of the record and examination of authorities, I reach the conclusion that there is no liability on the part of the Government for the death of appellant's dogs.

FINAL DETERMINATION

Therefore, the determination (T-D-B-41) of the Field Solicitor denying the claim of Mr. Albin D. Molohon is affirmed.

EDWARD W. FISHER,
Deputy Solicitor.

CLAIM OF RICHARD W. HATCH

TA-215

Decided April 27, 1961

Claims against the United States: Generally

The Department of the Interior does not have authority to consider, ascertain, adjust, determine, settle and compromise any admiralty claims for personal property losses suffered by a Government employee on a "public vessel."

Rules of Practice: Appeals: Dismissal

Claim must be dismissed since the Federal Tort Claims Act excepts admiralty claims. Neither the Suits in Admiralty Act nor the Public Vessels Act authorize the Secretary of the Interior to consider, ascertain, adjust, determine, settle, and compromise admiralty claims caused by a public vessel of the United States.

APPEAL FROM ADMINISTRATIVE DETERMINATION

On January 24, 1961, the Acting Field Solicitor, Anchorage Region, denied ¹ the claim in the amount of \$180.28 of Mr. Richard W. Hatch, an employee of the Fish and Wildlife Service, for personal property lost in the sinking of the M/V *Mackinaw*.

The claimant has timely appealed from that determination by letter of February 23, 1961. In his appeal, claimant states, in part, as follows:

¹ T-A-J-3.

The cases cited to show precedent for remedy under the Public Vessels Act illustrate the action taken by a private citizen or corporation to recover damages caused by a public vessel. There appears to be no precedent for a federal employee, sailing aboard a government vessel in line of duty, recovering damages to personal property aboard the same vessel suffered as a result of an accident involving this vessel only.

The intent of the Federal Tort Claims Act is clearly to provide a means of relief in cases of small claims against the government at minimum cost to both the government and the claimant. Consideration of my claim under the Federal Tort Claims Act would clearly be in the best interests of the government because the cost to the government of processing an action in admiralty would be out of proportion to the value of the claim itself. The same is true of the cost to the claimant. I conclude, therefore, that justice could best be served and the interest of the United States best protected by consideration of my claim under the Federal Tort Claims Act.

I. FACTS

On Monday, June 20, 1960 at about 3:00 a.m., the M/V *Mackinaw*, a vessel owned and operated by the Fish and Wildlife Service, struck rocks off Circle Point in Taku Inlet, approximately 10 miles south-east of Juneau, Alaska, and sank in 50 to 60 fathoms of water.²

The claimant, a Fishery Research Biologist, was on the vessel on official duty. In a memorandum to the Acting Field Solicitor of November 10, 1960, the Administrative Officer of the Bureau of Commercial Fisheries in Juneau, Alaska, describes these duties as follows:

Dr. Richard W. Hatch was the immediate supervisor of the particular research project, for the accomplishment of which, the vessel was necessary and which it was engaged in at the time of the accident. However, the rules of this Region are that the Master of the vessel is in command of the vessel at any time that it is at sea. The Master directed that Dr. Hatch and Mr. Hurd, a temporary employee, go below deck and obtain rest so that when their respective watches came up they would be ready to assume responsibility for the vessel during that period of time. Dr. Hatch and Mr. Hurd were asleep below deck at the time of the accident.

The minutes of the meeting of the Regional Safety Committee of August 10, 1960, state, in part:

There appeared to be no question that the fact that the Master-Engineer fell asleep at the wheel constituted a "neglect of duty". * * *

The conclusion is inescapable from a reading of the record that the neglect of duty was the proximate cause of the sinking, since the Master-Engineer lost control of the vessel.

The M/V *Mackinaw* "was a 52' vessel operated in coastal waters of Alaska primarily in connection with * * * [the] research program [of the Bureau of Commercial Fisheries, Fish and Wildlife Service].

² The M/V *Mackinaw* was en route in coastal waters to a fisheries project area.

³ The record also contains a copy of a memorandum for the files by the Acting Regional Director, Bureau of Commercial Fisheries, of Juneau, Alaska, of August 29, 1960, in which he states that he "suspended" the Master-Engineer "for two weeks without pay and reduced" him "in grade to 1st Assistant Engineer."

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* * * Any cargo hauling would generally be limited to the transportation of supplies needed for performance of research work.”⁴

II. NON-APPLICABILITY OF THE FEDERAL TORT CLAIMS ACT

The Federal Tort Claims Act in 28 U.S.C., 1958 ed., sec. 2680, contains 13 classes of cases expressly excepted from the grant of jurisdiction under the Act.⁵ Among these exceptions is the following:

(d) Any claim for which a remedy is provided by sections 741-752,⁶ 781-790⁷ of Title 46, relating to claims or suits in admiralty against the United States.

Consequently, if the Fish and Wildlife vessel M/V *Mackinaw* is a “public vessel” within the meaning of 46 U.S.C., 1958 ed., sec. 781, this Department would have no jurisdiction under the Federal Tort Claims Act,⁸ because the Public Vessels Act would then provide the, and an exclusive one at that,⁹ remedy.

III. PUBLIC VESSEL

The Public Vessels Act does not contain a definition of “public vessel.” However, the case law establishes well that the “operation and control by the United States” criterion is the determining factor as to whether or not a vessel is a “public vessel.”

In the following cases a vessel was held to be a public vessel:

Rodriguez v. United States, 204 F. 2d 508 (3d Cir., 1953): dredge owned and operated by the United States Army Corps of Engineers.

Thomason v. United States, cited *supra*, fn. 8: tugboat leased from private owners, which was operated by the United States in the European Theatre of Operations.

Canadian Aviator Ltd. v. United States, 324 U.S. 215 (1944): Navy patrol boat.

Connors Marine Co. v. Petterson Lighterage and Towing Corp., 60 F. Supp. 960 (S.D.N.Y., 1944): Stakeboat “provided” by the United States for mooring purposes in the harbor.

Hence, we are in full agreement with the conclusions reached in *Rudolph Sundberg*, T-557 (October 6, 1953):

Thus, while the term “public vessel” has not been defined, it has been applied to many types of vessels operated by any of several agencies of the United

⁴Memorandum of Chief, Division of Administration, Bureau of Commercial Fisheries, Fish and Wildlife Service, to Office of the Solicitor, of April 6, 1961.

⁵*Repscholdt v. United States*, 256 F. 2d 765 (7th Cir., 1958); *Somerset Seafood Co. v. United States*, 193 F. 2d 631, 633 (4th Cir., 1951); Robert Gerwig, *A Decade of Litigation Under the Federal Tort Claims Act*, 24 Tenn. L. Rev. 301, 302-3 (April 1956).

⁶Suits in Admiralty Act, 41 Stat. 525.

⁷Public Vessels Act, 43 Stat. 1112.

⁸This section of the Federal Tort Claims Act “strongly” indicates “a congressional policy to keep the enforcement of all maritime claims in the admiralty courts as distinguished from other classes of suits in which the United States has consented to be sued.” *Thomason v. United States*, 184 F. 2d 105, 108 (9th Cir., 1950).

⁹*Of. ibid.*

States. I cannot distinguish between the "Dennis Winn", operated by the Fish and Wildlife Service, and the boats held to be "public vessels" in the cases cited.

The same reasoning applies to the M/V *Mackinaw*. We agree with the conclusion of the Acting Field Solicitor that the M/V *Mackinaw* is a "public vessel" within the meaning of 46 U.S.C., 1958 ed., sec. 781.

IV. REMEDY AVAILABLE UNDER PUBLIC VESSELS ACT

Since we have concluded that the M/V *Mackinaw* is a "public vessel" it follows that this Department is without jurisdiction to decide the claim under the Federal Tort Claims Act, since 46 U.S.C., 1958 ed., sec. 781 provides the remedy.¹⁰

The Public Vessels Act contains no counterpart¹¹ to the administrative authority given to the head of the Department in the Federal Tort Claims Act, 28 U.S.C., 1958 ed., sec. 2672, to "consider, ascertain, adjust, determine and settle any claim for money damages of \$2500 or less against the United States."

The provisions of 46 U.S.C., 1958 ed., sec. 749¹² are not available for the adjustment or settlement of the instant claim, since the M/V *Mackinaw* does not fall within the definition of "merchant vessel"¹³ as used in that section.

Hence, no administrative adjustment, settlement, or compromise concerning the instant claim can be made by this Department under the Federal Tort Claims Act, the Suits in Admiralty Act, or the Public Vessels Act.

V. DETERMINATION

The determination of the Acting Field Solicitor, Anchorage, Alaska Region (T-A-J-3) is affirmed. However, the determination is modified to read as follows:

I determine that the claim of Richard W. Hatch is dismissed for lack of jurisdiction.

EDWARD W. FISHER,
Deputy Solicitor.

¹⁰ 46 U.S.C., 1958 ed., sec. 781, provides for libel in admiralty or impleader of the United States, as follows: "A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States * * *."

¹¹ Some federal agencies have express statutory authority to settle or compromise admiralty claims, e.g., Secretary of the Navy, 10 U.S.C., 1958 ed., sec. 7622.

¹² "The Secretary of any department of the Government of the United States * * * having control of the possession or operation of any merchant vessel are, and each is, authorized to arbitrate, compromise, or settle any claims in which suit will lie under the provisions of sections 742, 744 and 750 of this title. [46]"

¹³ *Calmar Steamship Corp. v. United States*, 345 U.S. 446 (1952).

*May 1, 1961***ESTATE OF WHITE HAT (FRANK WOOD OR WOODS)****IA-1194***Decided May 1, 1961***Indian Lands: Descent and Distribution: Wills**

The modification of a probate order by an Examiner of Inheritance with respect to the allowance of a creditor's claim does not constitute reopening of the case in regard to the determination of heirs, and denial of a petition for rehearing on the latter point was proper when the time for filing such petition had expired almost two years before the denied petition was filed.

**APPEAL FROM AN EXAMINER OF INHERITANCE
BUREAU OF INDIAN AFFAIRS**

Antoine Sutton (Thurman Whitehat) has appealed to the Secretary of the Interior from a decision by an Examiner of Inheritance dated April 22, 1960, denying his petition for rehearing in the matter of the probate of the estate of White Hat (Frank Wood or Woods), deceased Arapaho Allottee No. 2283.

In his original order dated July 11, 1958, the Examiner disapproved a will which the decedent had executed many years prior to his death and determined the heirs according to law. The order was issued following a hearing held on June 25, 1958. Appellant received a notice of this hearing but did not attend. He states in his present appeal that he missed the hearing because of illness in his family. Appellant was duly notified of the July 11, 1958, order and of his right to request a rehearing within 60 days of the date of the order. Such procedure is in accordance with the regulations (25 CFR 15.17). His petition, dated March 7, 1960, was not filed until April 1, 1960, almost two years from the date of the order. No explanation is given for the failure to petition for a rehearing within the 60-day period stated in the 1958 order.

The Examiner denied appellant's petition for a rehearing on the ground that it was not timely filed. This decision was correct and the only one possible under the circumstances.

Appellant sought to obtain the requested rehearing on the ground that the case was reopened by a modification order issued by the Examiner on February 5, 1960. The purpose of the modification order was to make a technical adjustment in the allowance of the claim of W. R. Galloway so that distribution of the estate could be facilitated. This in no way affected the claim asserted by appellant and is not cited by him as a basis for appeal. It is true that the notification given to interested parties in connection with the modification order advised them of their right to request a rehearing within 60 days. However, the reference is to a rehearing on the question of the modification order

and did not reopen the case for the consideration of other questions, such as the determination of heirs.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (Section 210.2.2A (3) (a), Departmental Manual (24 F.R. 1348)), the decision of the Examiner denying appellant's petition for a rehearing is affirmed, and the appeal is dismissed.

EDWARD W. FISHER,
Deputy Solicitor.

ESTATE OF JAMES OLIVER BUTLER DYER

IA-1159

Decided May 1, 1961

Indian Lands: Descent and Distribution: Claims Against Estates

An agreement relating to restricted Indian lands which has not been given departmental approval is null and void, and a claim based upon it will not be allowed against a restricted Indian estate.

APPEAL FROM AN EXAMINER OF INHERITANCE BUREAU OF INDIAN AFFAIRS

Florence Dyer has appealed to the Secretary of the Interior from a decision of an Examiner of Inheritance dated July 31, 1959, denying her petition for a rehearing in the matter of the estate of James Oliver Butler Dyer, deceased Quinaielt Allottee No. 987.

Appellant is the divorced wife of decedent and is mentally incompetent. Her appeal, processed by counsel, is from the disallowance by the Examiner of a claim for a one-half interest in and to the proceeds from any sale of decedent's own restricted Indian allotment, including a one-half share in and to all proceeds from the sale of minerals or timber on such land. Appellant stated in her claim that the appraised value of the land is reported at \$35,000, of which she claims one-half. Appellant bases her claim upon a divorce decree and a purported assignment executed by the decedent.

Appellant and decedent were divorced in the Superior Court of King County, Washington, on February 3, 1955. The decree purported to give appellant, who was the plaintiff in the action, an undivided one-half interest in certain of decedent's restricted Indian property, which was not his own allotment and which was later sold, describing it as "community" property. The decedent was also ordered to pay appellant \$150.00 per month temporary support money during the pendency of the action and \$100.00 per month as permanent support money until the further order of the court.

Decedent did not comply with the court order, and counsel for appellant instituted garnishment proceedings against an individual believed to be receiving money from decedent and a bank where it was

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thought the funds were deposited. During the pendency of these proceedings and in an effort to obtain the benefits which had not been forthcoming under the court order, the aforesaid assignment was agreed upon. By the terms of this assignment, executed by decedent on October 14, 1957, appellant was to receive an undivided one-half interest in all of the proceeds from the sale of lands, minerals or timber from his own restricted allotment as well as from the other restricted Indian land which he owned. Appellant alleges the decedent received \$13,250.00 as his share of the sale of the restricted Indian land described in the divorce decree, other than his own allotment, of which it is claimed that under the decree she is entitled to \$6,625.00

Before the execution of the assignment the agency superintendent had correctly indicated to counsel for appellant that the divorce court's order was not effective insofar as it applied to restricted Indian property. In the absence, as here, of specific legislative authority to adjudicate interests in restricted Indian land, the courts have no such power. See *McKay v. Kalyton*, 204 U.S. 458 (1907). The superintendent further indicated, however, that decedent could voluntarily make provision for his former wife in connection with his restricted Indian property. Proceeds from the sale of restricted Indian land turned over to the decedent by the Agency were, of course, thereafter subject to disposition by him without Agency supervision. It appears that from such funds the decedent paid the appellant \$2,500.00 on November 7, 1957, and \$5,432.20 on February 3, 1958.

After decedent's death on March 11, 1958, the Examiner, both in the original order determining heirs and in the decision denying a rehearing, took the position that the purported assignment was of no force and effect insofar as it attempted to reach restricted Indian property since it had not been approved by the Department of the Interior. Appellant apparently contends that the correspondence had with the Agency concerning satisfaction of the provisions of the divorce decree, including the Agency's acknowledgment of receipt of a copy of the assignment, constitutes this Department's approval of it. The fact that counsel for appellant were advised by the Agency that the matter of decedent's providing support for his former wife could be worked out on a voluntary basis with him as far as his restricted Indian property was concerned, certainly is not approval of any agreement concerning such property which decedent might execute. Nor does the mere receipt of such an agreement and acknowledgment thereof by the Agency constitute approval of it.¹ We must, therefore,

¹ Cf. *Green v. Menominee Tribe*, 233 U.S. 558, 570 (1914), holding that an Indian agent's assent to a contract would not suffice as a substitute for the approval required by law.

also conclude with the Examiner that the agreement was never approved.

Since the assignment relates to lands allotted under the General Allotment Act of February 8, 1887, 24 Stat. 388, as amended, and since the assignment was not approved by the Department, it is null and void under the provisions of the cited act, reading:

*** And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same *** such conveyance or contract shall be absolutely null and void: *** 25 U.S.C. 1958 ed., § 348.

As regards the question of the amount of support appellant was owed under the divorce decree, as the Examiner points out, the \$7,932.20 paid by decedent exceeds the total sum specified in the decree at the rate of \$150 per month from October 12, 1954, to February 3, 1955, and thereafter at \$100 per month until March 11, 1958, the date decedent died. As previously demonstrated, that part of the court decree purportedly dividing restricted Indian property between the appellant and decedent in the divorce proceedings was invalid. Since appellant under the unapproved assignment also has no valid claim, it is immaterial insofar as her claim is concerned that the Agency decided upon the decedent's death to withdraw his allotment from sale.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (Section 210.2.2A(3)(a), Departmental Manual, 24 F.R. 1348), the decision of the Examiner of Inheritance denying appellant's petition for a rehearing is affirmed and the appeal is dismissed.

EDWARD W. FISHER,
Deputy Solicitor.

APPEAL OF MIDLAND CONSTRUCTORS, INC.

IBCA-272

Decided May 3, 1961

Contracts: Appeals

The Board is without jurisdiction to consider an untimely appeal.

Contracts: Appeals—Rules of Practice: Appeals: Timely Filing

The Board will not dismiss an appeal, and will consider it to be filed timely where an action taken by the contractor-appellant within the appeal period indicates its present intent to appeal to higher authority. If that action is followed by formalization within a reasonable time, such formalization will be taken into consideration as one of the factors in arriving at the conclusion that a letter of dissatisfaction or protest constitutes a timely appeal within the meaning of the "disputes" clause. The wording of the "disputes" clause itself indicates, under the circumstances, the present intent to appeal to higher authority.

May 3, 1961

BOARD OF CONTRACT APPEALS

Department Counsel has moved the Board to dismiss the appeal—on the grounds that said appeal was not filed within 30 days from the date of receipt of the findings as required by the contract.

He argues that the letter of the contractor of January 11, 1961, quoted in part, *infra*, does not constitute a proper notice of appeal for two reasons:

(1) It does not constitute a present appeal from the findings. It is simply an information letter advising the Government that at some future date an appeal would be taken.

(2) It does not meet the requirements of the Board contained in section 4.5 of its regulations, which provides, among other things, that notice of appeal shall specify the portion of the findings of fact or decision from which the appeal is taken, and the reasons why the findings or decision are deemed erroneous.

He further states that if the Board should overrule the Government's motion to dismiss on jurisdictional grounds, "the Government moves that the Board dismiss the subject appeal on the merits," citing Wickes Engineering and Construction Co.¹

The record discloses that on December 15, 1960, the contracting officer issued a "Findings of Fact and Decision" (hereinafter referred to as the "decision") concerning claims of the contractor in the revised amount of \$11,710.98,² allowing an amount of \$4,857.12. The decision contained in its paragraph 24 the following advice concerning appeal rights:

A copy of this findings of fact and decision is being transmitted to the contractor, with attention being invited to the right of appeal within 30 days, in accordance with Clause 6 as modified by Clause 27 (b) of the General Provisions of the contract. Such appeal, if made, should be addressed to the Board of Contract Appeals, Office of the Solicitor, and should be mailed to or filed with the contracting officer for transmittal to the Board. A copy of the regulations governing contract appeals is attached to the contractor's copy hereof.

The return receipt establishes that the decision was received by the contractor-appellant on December 29, 1960.

On January 11, 1961, Appellant sent a letter addressed to

United States Department of the Interior
Bureau of Reclamation,
Fargo Construction Field Division,
P. O. Box 1993
Fargo, North Dakota

which, after reference to the "Findings of fact in the matter of additional compensation—Contract No. 14-06-D-3152—Stringing Fargo

¹ IBCA-191, November 30, 1960; 61-1 BCA par. 2872.

² Subsequent to the release on contract, the contractor submitted revised claims in the amount of \$11,710.98 in lieu of general claims in the amount of \$13,413.22.

Granite Falls 230-IV—Specifications No. DC-5156 etc.”³ states the following:

The finding of fact referred (sic) to above which you transmitted to us by your letter of December 27, 1960⁴ has been reviewed in this office. These findings are not satisfactory to this company and an appeal will be made.

At such time as our appeal is completed and ready for filing your office will be furnished a copy.

No reply appears to have been made to this letter by the Construction Engineer, Fargo, North Dakota, or by the contracting officer. On February 10, 1961, appellant sent another letter, which in its pertinent part, reads as follows:

Assistant Commissioner and
Chief Engineer
Bureau of Reclamation
Building 58
Denver Federal Center
Denver, Colorado

Subject: Findings of Fact in the matter of claim for additional compensation on Contract No. 14-06-D-3152 Specifications DC-5156

Dear Sir:

As advised in our letter to your Fargo Field Division dated January 11, 1961 (print attached) we herewith submit, for your consideration, our exceptions to the Findings of Fact dated December 15, 1960.⁵

* * * * *

Our sincere thanks for your consideration in this matter.

Appellant is not represented by counsel.

A copy of Department Counsel's motion has been furnished to Appellant by the Department Counsel. However, Appellant has not submitted any statement on the motion. Thus, the allegations of the Government motion have neither been admitted nor denied. The facts and circumstances described above, which appear in the record before us, are deemed sufficient by the Board to enable it to dispose of the motion.⁶

There are two issues presented by the motion: (1) Is the letter of January 11, 1961, quoted *supra*, sufficient to constitute a timely notice of appeal under the “disputes” clause; (2) Does the letter of January 11, 1961 meet the requirements of 43 CFR 4.5(a).

These issues will be considered *seriatim*.

³ There is no doubt that this letter refers to the decision of December 15, 1960.

⁴ No explanation has been furnished of the Board regarding the difference between the date of decision and its transmittal to the appellant. However, it is established that any appeal period would start from the date of the receipt of the decision by the contractor on December 29, 1960.

⁵ This part of the letter concerns discussions of the merits of claims nos. 2, 3, and 4.

⁶ Cf. *Trenton Sportswear, Inc.*, ASBCA No. 3989, April 2, 1957, 57-1 BCA par. 1227. The ASBCA stated there: “The Government's request for our decision on its motion is appropriate. To consider an untimely appeal on the merits would serve no useful purpose and would occasion an unnecessary expenditure of time and money by the parties and the Board. Since neither party has requested a hearing our decision, of necessity, is upon the basis of the record before us.”

May 3, 1961

1. *Timeliness of Appeal*

The cases are numerous in other appeal boards concerning letters written within the appeal period to the contracting officer protesting a decision, or, as in the instant case, expressing dissatisfaction with the decision, without expressly indicating an appeal or a present intent to appeal. This Board has been confronted only sparingly with that question.

In *Westinghouse Electric Supply Company*,⁷ a letter of appellant contained the following statement:

I realize the inconvenience our failure to perform has caused both you and your Morgantown operation but under the circumstances, am requesting to have the penalty clause waived on this contract, without prejudice. Thank you for your patience and any consideration you might possibly be able to give on this request.

The Board construed this letter as follows:

Giving the contractor the full benefit of every doubt, the most that can be said for this letter is that it was a request that the contracting officer reconsider the actions taken and threatened by his letter of July 13, 1956, rather than an application for their reversal by some higher authority.⁸

In *Henkle and Company*,⁹ a letter in which the contractor stated that

We wish to register our desire to appeal the Findings of Fact as submitted with your letter of June 23, 1959.

We would appreciate your notification of the time and date of our appeal as soon as possible with any other pertinent instructions.

was considered by the Board to support "a conclusion that an appeal to higher authority was intended."

In *Rea Construction Company*,¹⁰ the contractor addressed a letter to the contracting officer and stated, in part, as follows:

Your letter of December 13, 1957,¹¹ in reply to our letter of January 16, 1957, is acknowledged.

We accept the nineteen days allowed by your letter. And we are requesting eighteen more days which are reiterated below, and we expect an allowance for the proportionate value of the contract over-run, and additionally request consideration for the value of the work performed (approximately \$45,701.00) during December 20, 1955 to March 20, 1956, which was done at great expense and poor progress but in an effort to deliver the project to you on time.

* * * * *

⁷ IBCA-107, July 30, 1957, 57-2 BCA par. 1365.

⁸ Reference was made to Joy, *The Disputes Clause in Government Contracts: A Survey of Court and Administrative Decisions*, 25 Fordham L. Rev. 11, 35-37 (1956).

⁹ IBCA-212, September 15, 1959, 66 I.D. 331, 59-2 BCA par. 2331, 1 Govt. Contr. 652.

¹⁰ IBCA-227, November 4, 1960, 60-2 BCA par. 2847, 2 Govt. Contr. 592.

¹¹ The contracting officer's letter of December 13, 1957 contained the following statement: "It is understood that this letter covers all matters in dispute growing out of performance of this contract." The Board held that this letter constituted a final decision.

We obviously did not make ourselves clear regarding the request for four (4) days between November 21 and 30—we do not refer to the curing period for development of strength before setting into final position. * * * Progress was not in proportion to the working days charged by you. We request these four (4) additional days.

We take exception to your saying that the labor situation was foreseeable. * * *

The Board held that the letter evidenced no intention of appealing to higher authority, citing *Reading Clothing Mfg. Co.*,¹² and *Sandler Company*,¹³ the Board held:

* * * It is not addressed to the Secretary of the Interior or Commerce as heads of the respective departments, or to any other person authorized to hear appeals. It contains no hint of an intention to appeal to any one else having authority to review decisions of the contracting officer. It is addressed to the contracting officer and merely seeks his reconsideration of appellant's request for the allowance of additional time for performance.¹⁴ Even in its most liberal reading, the statement "We take exception to you saying that the labor situation was foreseeable" can hardly be considered as an actual intention to enter an appeal for review by higher authority. The tenor of the letter is a mere request for reconsideration by the contracting officers.¹⁵

In other decisions which will have a bearing on the disposition, the Board held:

1. The provision of the nature of that contained in the "Disputes" clause concerning the taking of an appeal within a stated period is jurisdictional. A review of a contracting officer's decision upon a question of fact is precluded unless an appeal is taken within the appeal period (that is the 30 days allowed for that purpose).¹⁶

The Board is without jurisdiction to consider an untimely appeal.¹⁷

2. After the appeal period has elapsed, neither the head of the department nor the Board can extend or waive the appeal period.¹⁸ This is expressly excluded by 43 CFR 4.16.¹⁹ However before the appeal period has elapsed, contracting officers may validly extend the appeal period.²⁰

3. However, under certain circumstances the Board will dismiss an appeal where "applicant abandoned its appeal, and there was complete inaction and

¹² ASBCA No. 3912, May 7, 1957, 57-1 BCA par. 1290.

¹³ ASBCA No. 4398, December 9, 1957, 57-2 BCA par. 1535.

¹⁴ See *Metalcraft Mfg. & Sales Corporation*, ASBCA No. 3949, September 12, 1957, 57-2 BCA par. 1415; *Mattel Incorporated*, ASBCA No. 3922, 3923, 3924, 3925 and 3926, September 30, 1958, 58-2 BCA par. 1946.

¹⁵ See *Edward Rosenberg d/ba Quaker City Products Company*, ASBCA No. 3968, August 2, 1957, 57-2 BCA par. 1380; *New York Rubber Corporation*, ASBCA No. 4618, January 24, 1958, 58-1 BCA par. 1593.

¹⁶ Refer *Construction Company*, IBCA 209, October 20, 1960, 67 I.D. 457, 461; 60-2 BCA par. 2831, 2 Govt. Contr. 561; *Bennett Industries, Inc.*, IBCA-102, April 23, 1957, 64 I.D. 113, 115, 57-1 BCA par. 1237; *Emasco Manufacturing Company*, IBCA-66, April 6, 1956, 63 I.D. 92, 96.

¹⁷ *Ibid.*, fn. 16. These decisions are based on *Poloron Products, Inc. v. United States*, 126 Ct. Cl. 816, 826 (1953).

¹⁸ Refer *Construction Company*, IBCA-209, October 20, 1960, 67 I.D. 457, 461; *Bennett Industries, Inc.*, IBCA, April 23, 1957, 64 I.D. 113, 115, 57-1 BCA par. 1237. Accord: *National Magnet Wire Corporation*, ASBCA No. 571, December 19, 1950.

¹⁹ Refer, *supra* fn. 16.

²⁰ *Ibid.*, fn. 16. Accord: *Jeppesen and Company*, ASBCA No. 1962, December 9, 1955.

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silence on the part of the contractor for a considerable period of time.”²¹ The Board will not dismiss if the “appeal letter, when read together with the claim of appellant meets the minimum requirement of the notice of appeal” and no intention to abandon appears.²²

4. The Board will jealously watch that substantive rights of the parties are not defeated by mere technicalities.²³

The Armed Services Board of Contract Appeals has held appeals to be timely where the Board has found from the record and surrounding circumstances an intention to appeal.²⁴

In other cases where such circumstances have not led to the conclusion that an appeal to higher authority was intended, the Board has held that the appeal was untimely.²⁵

In the landmark case of *Reading Clothing Manufacturing Company*,²⁶ the Armed Services Board of Contract Appeals states:

It would seem obvious from the foregoing decisions that the Board had been consistent in requiring not only some action by the contractor within the 30-day appeal period indicating his dissatisfaction or disapproval of the action of the contracting officer but, in addition, his present intent within the 30-day period to appeal to the Secretary or at least to an authority superior to the contracting officer. The Board has taken a liberal view of actions by contractors to file such intention and such appeal. However, such intention must be evident and must be actual. The Board has no authority to waive the rights of the Government, and in the line of decisions herein referred to has not done so. It will be noted that the “Disputes” article provides that the decision of the contracting officer is final and conclusive if no appeal is taken within 30 days. Upon the expiration of that period without such an appeal, the rights of the Government become fixed and the Board is powerless to render relief. The liberality evidenced in some of these decisions is not a liberality of the Government’s rights but rather a liberal interpretation of the appellant’s acts. It is the appellant and the appellant alone who can protest his rights under the contract. Where he fails by neglect or design or inadvertence to do so, this Board is powerless to assist him.

We are, generally, in full agreement with the holdings of the Armed Services Board of Contract Appeals.

²¹ *Henkle, fn. 9, supra; L.N. & R. Corporation*, IBCA-201, September 21, 1960.

²² *Weldfab, Inc.*, IBCA-268, April 11, 1961; *General Excavating Company*, IBCA-188, August 15, 1960, 60-2 BCA par. 2754, 2 Govt. Contr. 469.

²³ *Henkle, supra, fn. 9* at 331-2.

²⁴ *Donnell Hydraulic Company*, ASBCA No. 5709, January 7, 1960, 60-1 BCA par. 2489; *James Lumber Company*, ASBCA No. 1991, March 31, 1954; *Union Sewing Machine Company*, ASBCA No. 1318, July 16, 1954; *New York Engineering Company*, ASBCA No. 289, April 13, 1950.

²⁵ *Capitol Airways, Inc.*, ASBCA No. 6412, September 30, 1960, 60-2 BCA par. 2798; *Anthony Grace & Sons, Inc.*, ASBCA No. 6167, June 29, 1960, 60-2 BCA par. 2682; *Automotive Tire Service, Inc.*, ASBCA No. 5647, October 27, 1959, 59-2 BCA par. 2393, 1 Govt. Contr. 785; *Stockard Steamship Corporation*, ASBCA No. 1763, July 22, 1955, 2 Govt. Contr. 185; *Dodson Electric Company*, ASBCA No. 3686, October 22, 1957; *James I. Poole, Inc.*, ASBCA No. 2100, July 22, 1954.

²⁶ *Reading Clothing, fn. 12, supra.*

Additionally, this Board will consider the formalization of the appeal, if followed within a reasonable time, as one of the factors to be taken into consideration in deciding whether or not the letter of dissatisfaction or protest involved here can be held to express an intent to appeal in a timely manner.²⁷

Further, this Board considers that the wording of the "disputes" clause itself supplies the element by which the contractor, through his letter of dissatisfaction or protest, indicates his present intent to appeal to the head of the department or an authority superior to the contracting officer.²⁸

Of course, in situations where the contractor clearly indicates that he does not intend to appeal to higher authority, the Board will dismiss the appeal as untimely.²⁹ *Volenti non fit injuria*.

The following cases support the conclusion that the letter of January 11, 1961 is tantamount to a notice of appeal.

In *National Magnet Wire Corporation*,³⁰ the Armed Services Board of Contract Appeals held that the language "we will avail ourselves of the provisions in the Contract under the heading 'Disputes' and we will file our appeal from your decision with the Board of Appeals" is sufficient. In *Nilson-Smith Construction Company and Northwestern Engineering Company*,³¹ the Corps of Engineers Claims and Appeals Board found that the following letter constituted an appeal

²⁷ Accord: *Mattel, Incorporated*, ASBCA Nos. 3922, 3923, 3924, 3925, and 3926, September 30, 1958, 58-2 BCA par. 1946. ("The letters of 26 October, written after the right to appeal had expired with the 30-day period, are not in and of themselves timely appeals, and they are ineffective to breathe new life into the expired rights to appeal. In thus holding we are influenced in large measure by the length of time which elapsed before the contractor finally decided to assert that its letters should be treated as appeals. We recognize that under different circumstances we have sometimes found somewhat similar letters to be sufficient for that purpose, e.g., Appeal of *Society Brand Hat Company*, BCA No. 1441. " * * It seems to the Board that the appellant's inaction speaks louder than words." On the other hand, in *Donnell*, fn. 24, *supra*, the Board states: "While it is true that in some of these cases formalization did follow within a short time, this was not a determining factor in the decisions. Formalization may be desirable, but it is not indispensable to effect an appeal under the contract. *Tarilton-MacDonald Company*, BCA No. 170, July 27, 1943."

²⁸ The basic holding of the Armed Services Board of Contract Appeals in *Donnell*, fn. 24, *supra*, reads as follows: "This Board, in line with the decisions of its predecessor, has not required formalization of an intent to appeal as a requisite for jurisdiction. As long as the contractor has within the 30-day appeal period indicated his dissatisfaction or disapproval of the action of the contracting officer and also indicated his present intent within this period to appeal to the Secretary or an authority superior to the contracting officer, the contractor's actions have been held to satisfy the requirements of a notice of appeal."

²⁹ *Westinghouse*, fn. 7, *supra*; *Rea*, fn. 10, *supra*. Accord: *Edward Rosenberg*, fn. 15, *supra* ("merely a protest"); *New York Rubber*, fn. 15, *supra*. ("It was not within Appellant's power unilaterally to prolong the dispute or to suspend the decision or the running of the 30 day appeal period by writing to the Contracting Officer within that period a letter which did not indicate an actual intent to appeal.")

³⁰ ASBCA No. 571, December 19, 1950. Accord: *National Magnet Wire Corporation*, ASBCA Nos. 539, 540, 541 and 542, July 28, 1950; *American Liberty Oil Co.*, BCA No. 1504, 4 CCF 60,234 (1947).

³¹ Eng. C & A No. 1471, June 13, 1958.

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within the meaning of the "disputes" clause and denied the Government's motion to dismiss:

Reference is made to your recent undated letter raising the proposed settlement of Modification No. 29 from \$29,700.00 to \$32,738.89.

We find the revised proposal unacceptable and are preparing to file an appeal.

In view of the fact that Modification 29 is now moving to the appeal stage the Electrical contractor questions the benefit to be derived by his presence at the Walla Walla meeting on 6 November, 1957. If you feel the Electrical Contractor should attend this meeting will you please advise us. (Underscoring supplied.)

In *Robert E. McKee General Contractor, Inc.*,³² the Veterans Administration Construction Contract Appeals Board considered as sufficient the following statement of the appellant: "We wish to reserve the right to appeal at a later date."

In *Donnell Hydraulic Company*,³³ appellant wrote "notice of appeal will be forwarded to you within seven days." These seem to be the longest seven days of record, since formalization of the appeal was not made by the appellant until more than two years later.³⁴ Despite this failure to prosecute, the Board held the appeal to be timely.³⁵

Perhaps the best realization appears in *Robert E. McKee General Contractor, Inc.*,³⁶ of the Veterans Administration Construction Contract Appeals Board:

The contract does not prescribe a particular form for an appeal notice. This Board and other contract appeals boards have, therefore, tended to be liberal in construing Appellant's letters to be adequate notices of appeal, leaning toward intent rather than exactitude of phraseology. This is considered to be justified since neither the contract nor the rules of the Board require or contemplate that notices of appeal necessarily will be written by persons trained in the law and familiar with the exactness required by the Courts in the drafting and filing of legal papers.

In view of the holdings quoted above, the letter of January 11, 1961, when read together with the wording of the "disputes" clause, and under the circumstances established by the record, is deemed sufficient

³² No. 302, July 5, 1960. The case is cited with approval in *George H. Schuman Company, Inc.*, VACAB No. 408, March 31, 1961. In *Schuman* appellant's attorney requested on November 21, 1960 advice concerning "the proper procedure for making an appeal." The Contracting Officer advised him on November 23, 1960. Appellant entered formal notice of appeal on January 4, 1961, from the decision of the contracting officer of November 18, 1960. The letter of November 21, 1960 was received by the contracting officer within the appeal period. The VACAB "under these circumstances" considered the letter to meet the minimum requirements for a valid notice of appeal and thus preserved the jurisdiction of the Board.

³³ Fn. 24, *supra*.

³⁴ The contracting officer denied the contractor's claim on February 21, 1957. The letter containing the quoted language was dated March 2, 1957. The complaint was not filed until May 18, 1959.

³⁵ However, in *Mattel*, fn. 27, *supra*, the Armed Services Board of Contract Appeals stated that "the appellant's inaction speaks louder than words." This would represent the attitude of this Board, fn. 21, *supra*.

³⁶ Fn. 31, *supra*, Accord: *National Magnet*, fn. 30, *supra*.

by the Board to satisfy the 30-day requirement of the "disputes" clause.

2. *Failure to comply with 43 CFR 4.5(a)*

43 CFR 4.5(a) provides:

An appeal from a findings of fact or decision of a contracting officer shall be made by notice of appeal in writing, addressed to the Board, and shall be mailed to or filed with the contracting officer, within the time allowed by the contract. The notice of appeal shall specify the portion of the findings of fact or decision from which the appeal is taken, and the reasons why the findings or decision are deemed erroneous.

This Board anticipates reasonable compliance with its rules. It does not, however, require rigid compliance.³⁷ The letter of January 11, 1961, the claim letters of the contractor which are attached to the decision of the contracting officer of December 15, 1960, and the letter of February 10, 1961,³⁸

when read together * * * meet[s] the minimum requirement of the notice of appeal.³⁹

In his motion the Department Counsel calls attention to the fact that the letter of January 11, 1961, was addressed to the "United States Department of the Interior, Bureau of Reclamation, Fargo Construction Field Division, P.O. Box 1993, Fargo, North Dakota." Such address or misdirection is not necessarily fatal.⁴⁰ The Construction Engineer, Fargo, North Dakota, was the "authorized representative" of the contracting officer,⁴¹ and Clause 1 of Standard Form 23A (March 1953) equates the authorized representative and the contracting officer.⁴² Hence, we find that the appeal is in substantial compliance with the requirement of the "disputes" clause that an appeal from a decision of the contracting officer must be made by mailing or otherwise furnishing to the contracting officer a written appeal addressed to the Secretary.⁴³

³⁷ Cf. fn. 23, *supra*.

³⁸ If that letter stood alone, it would furnish a classical example to illustrate those cases where the text of the instrument negates an intent to appeal to high authority, cf. fn. 29. The letter of February 10, 1961, does not affect adversely the sufficiency of the letter of January 11, 1961.

³⁹ *Weldfab, Inc.*, IBCA-268, April 11, 1961; *General Excavating Company*, IBCA-188, August 15, 1961, 60-2 BCA par. 2754, 2 Govt. Contr. 469.

⁴⁰ *New York Engineering Company*, ASBCA No. 289, April 13, 1950. However, a letter addressed to the contracting officer, not evidencing an intent to appeal, may be fatal. *Rea*, fn. 10, *supra*.

⁴¹ The Construction Engineer signed as the "authorized representative" Change Order No. 1 of December 28, 1959.

⁴² Paragraph (b) of Clause 1 reads: "The term 'Contracting Officer' as used herein, shall include his duly appointed successor or his authorized representative."

⁴³ It is noted that the wording of the disputes clause is different from the language used in the decision of the contracting officer advising the contractor concerning his appeal rights. A third variation is found in 43 CFR 4.5(a) which directs the contractor to address the appeal to the Board, and "shall be mailed to or filed with the contracting officer."

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Consequently the motion to dismiss on account of the failure to comply with 43 CFR 4.5(a) is denied.

CONCLUSION

1. The motions of the Government, to dismiss the appeal for failure to appeal timely and for failure to comply with 43 CFR 4.5(a), are denied.

2. The motion to dismiss the subject appeal on the merits is denied.

3. Consequently, the Board takes jurisdiction and will decide the appeal on the merits.

PAUL H. GANTT, *Chairman.*

THOMAS M. DURSTON, *Member.*

JOHN J. HYNES, *Member.*

APPEAL OF ALCAN PACIFIC COMPANY

IBCA-276

Decided May 8, 1961

Contracts: Release

An exception in a release taken by a contractor during the appeal period is not a proper substitute for a notice of appeal.

Rules of Practice: Appeals: Generally

The Board will be strict in determining whether a particular appeal was mailed within the appeal period, but liberal in determining whether a particular writing constitutes an intent to appeal.

Rules of Practice: Appeals: Extensions of Time

Miscalculation on part of the contractor as to the date of expiration of the appeal period is insufficient to affect the running of the appeal period. The Board is powerless to extend the appeal period after it has elapsed.

Rules of Practice: Appeals: Dismissal

An appeal must be dismissed as untimely when filed subsequent to the expiration of the appeal period.

Rules of Practice: Appeals: Timely Filing

A notice of appeal prematurely filed is not validated merely by the subsequent issuance of a decision by the contracting officer on the same subject as that covered by the notice.

BOARD OF CONTRACT APPEALS

On April 7, 1961, Department Counsel filed a motion to dismiss the above-identified appeal "for lack of jurisdiction on the ground that it was not filed within the time prescribed by the contract."

The appeal file discloses that the above-identified contract called for the construction of the Bethel School in Bethel, Alaska. During the performance of the work a dispute arose concerning the sufficiency of the intercommunication system. The matter was discussed between the contracting officer and the contractor in a meeting on December 1, 1960. On December 7, 1960, the contracting officer directed the contractor to make certain changes in the system so that it would conform to the plans and specifications of the contract.¹

On December 13, 1960, the contractor replied as follows:

Attached hereto please find one copy of letter from The Lamplighter Electric Co. dated December 10, 1960. It is requested that this letter be associated with Item #21 of our letter dated December 10, 1960. The following is our proposal to perform the additional work of re-vamping the inter-com system in accordance with your instructions.

Subcontractor Quote	\$1500. 00
20% for Overhead and Profit	300. 00
Total Amount This Proposal	<u>\$1800. 00</u>

Your timely review and favorable action is herewith most respectfully requested.

The contracting officer replied promptly on December 16, 1960, in part, as follows:

Our letter of December 7 requires compliance with the two notes on Plan E-1 which require home runs of 3/C #22 W/tinned copper shielding and overall jacket from each room to the annunciator and control panel in the principal's office.

We understand your subcontractor's position as advanced in his letter of December 10, 1960, but request that you call his attention to a basic error in his letter of December 10. Paragraph 3.1. on page 2 is not correct. Under the words "High School Area" near the upper right corner on sheet E-2 of the plans appears the note: "3/C #22 W/TINNED COPPER SHIELDING & OVERALL JACKET from EA. RM." (Italics supplied.)

Our position that these conductors are required from each room under the existing contract is based on the notes on this "Intercom Riser" on plan E-2.

Please call your subcontractor's attention to the wording of these notes and direct him to proceed with the work with reasonable promptness.

Section 5, Authority of the Contracting Officer states in part: "and shall decide all questions of fact which may arise as to the interpretation of the plans and specifications." "All such decisions by the Contracting Officer shall be

¹ The letter reads, in part, as follows:

"This letter confirms the verbal directive during the conference of December 1, 1960 that proper operation of the intercommunication system requires compliance with the two notes on plan E-1 which notes require home runs of 3/C #22 w/tinned copper shielding and overall jacket from each room to the annunciator and control panel in the principal's office.

"Please direct your sub-contractor to correct his installation accordingly.

"Complete workmanlike patching and painting of any walls cut in connection with this work will be required."

May 8, 1961

subject to appeal as provided in Clause 6 of Standard Form 23A—General Provisions—Construction Contracts.” Clause 6 is superseded by Clause 37 which appears on the last page of the General Provisions (Continued).

Please review this error in your subcontractor's position. We will give you a written Contracting Officer's decision in this matter, if you have determined to appeal, in view of this basic error in his position.

On January 7, 1961, the contractor wrote the following letter:

U.S. Dept. of Interior

Office of Territories

Alaska Public Works

P.O. Box 1181

Juneau, Alaska

Ref: Bethel Schools

Subject: Re-vamping of the Inter-communication System

Gentlemen:

Attached hereto please find a copy of a letter from Lamplighter Electric Co. dated December 27, 1960.

Your attention is directed to the second paragraph of the attached letter, wherein our subcontractor advises that he intends to pursue collection of subject claim. You are herewith advised that we concur with the subcontractor's position.

It has now been determined that this claim will be appealed, and we therefore request a written contracting officer's decision in accordance with the last paragraph of your letter dated December 16, 1960.

Very truly yours,

ALCAN PACIFIC COMPANY,

WILLIAM G. JONES,

General Superintendent.

On January 25, 1961, the contracting officer wrote to appellant and identified the letter in the caption as “Contracting Officer's Decision Wiring Inter-Communication System Project Aaa, 50-A-242, Bethel School.” The letter concluded:

The Contracting Officer's decision is that the contractor's claim, for additional compensation for installing the intercom wiring as directed, is hereby denied.

~~Clause 37 of the General Provisions of this construction contract supersedes Clause 6.~~

Clause 37 states that the Contracting Officer's decision in any dispute concerning a question of fact arising under this contract shall be final and conclusive *unless within 30 days from the date of receipt thereof, the Contractor appeals therefrom by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary.* You, therefore, have 30 days from the date of receipt of this decision to appeal from it. (Italics supplied in original.)

The return receipt, which is part of the record, indicates that the decision was received by the contractor on January 28, 1961.

On January 30, 1961, the contractor wrote to its subcontractors, The Lamplighter, Anchorage, Alaska. The letter reads as follows:

Attached hereto is one copy of letter dated January 25, 1961, from the Department of Interior, marked Exhibit 9. You are advised that one copy of Exhibit 2 through 8 are in our files and open for your review.

We feel that the attached letter is self explanatory, and we particularly direct your attention to the last paragraph wherein it is required that you must reply within thirty (30) days, or by March 2, 1961, if it is your intent to appeal the Contracting Officer's decision.

On January 31, 1961, the contracting officer sent a letter to the contractor which contained, in part, the following:

The enclosed "Balance on Contract" covers the retained percentage. You may insert an exception in this release to cover your claim for the work on the portion of the intercom system which is in the high school portion of the building, which is under the Federal Contract. When the Interior Department Board of Contract Appeals makes the decision on this appeal the exception in the Release will be handled accordingly. If the decision is against you the payments as previously explained will have completed the contract. If you win the appeal, a separate payment will be made in accordance with the decision of the Board of Contract Appeals.

On February 22, 1961, the contractor executed a release which was received by the contracting officer on February 27, 1961. At the bottom of the release the contractor stated:

This release does not include our claim in the amount of \$1,800.00 (ONE THOUSAND EIGHT HUNDRED DOLLARS AND/100) for re-vamping the intercommunication system.

On March 2, 1961, the contractor sent the following letter:

Alaska Public Works
P.O. Box 1181
Juneau, Alaska
Ref: Bethel Schools

Subject: Appeal Contracting Officer's Decision
(Re-Wiring Intercommunication System)

Gentlemen:

In accordance with your letter dated January 25, 1961, we do herewith appeal the Contracting Officer's decision.

In accordance with the third paragraph of the afore-mentioned letter, forty percent (40%) of our \$1800.00 claim is for the High School portion of our contract, or the Federal Contract, and sixty percent (60%) of our \$1800.00 claim is the Grade School portion, or the State of Alaska Contract. We therefore submit the original and three copies of this appeal to the Federal Government for further action, and the original and three copies of this appeal to the State of Alaska for further action.

In the event further information is required, we most respectfully request that we be so advised.

Yours very truly,

ALCAN PACIFIC CO.

That letter was received by the contracting officer on March 6, 1961. The contracting officer replied on March 17, 1961, as follows:

May 8, 1961

Mr. William G. Jones
Alcan Pacific Company
Box 1551
Anchorage, Alaska

Subject: Appeal Letter of March 2, 1961
Inter-Com Wiring
Project Aaa. 50-A-242
Bethel High School

Dear Mr. Jones;

Please refer to the Contracting Officer's letter of January 25 which states in the last paragraph, "Clause 37 states that the Contracting Officer's decision in any dispute concerning a question of fact arising under this contract shall be final and conclusive *unless within 30 days from the date of receipt thereof, the Contractor appeals therefrom by mailing or otherwise furnishing to the Contracting Officer a written appeal addressed to the Secretary.*"

Since your letter dated March 2, 1961 is not timely and should have been prior to February 27, 1961, we will proceed to close out the contract in the usual manner.

Yours very truly,

JOHN D. ARGETSINGER,
Director.

The Contractor, in turn, replied by letter of March 27, 1961, as follows:

Department of Interior
Office of Territories
Alaska Public Works
P.O. Box 1181
Juneau, Alaska
Ref: Bethel Schools

Subject: Appeal Contracting Officer's Decision
(Re-Vamping the Inter-communication System)

Gentlemen:

Receipt is acknowledged of your letter from Department of Interior, Office of Territories, dated March 17, 1961, as signed by Mr. John D. Argetsinger, Director.

It is noted in the last paragraph of the aforementioned letter that the appeal is being dismissed on the grounds that it was not timely filed.

We also acknowledge receipt of copy of letter from Alaska Public Works, dated March 24, 1961, as signed by Mr. John D. Argetsinger, Director, to Board of Contract Appeals, United States Department of Interior, Office of Solicitor, Washington 25, D.C., which reiterates the recommendation that the appeal be dismissed on the grounds that it was not timely filed.

We respectfully direct your attention to our letter dated January 7, 1961, which clearly states our intent to appeal the Contracting Officer's decision. We further direct your attention to Release on Contract, which takes exception, and clearly states this Contractor's intent to appeal the Contracting Officer's decision.

We attach hereto two copies of letter dated January 30, 1961, from Alcan Pacific Co. to The Lamplighter, our electrical subcontractor. You will note in this letter

that the thirty-day period was mis-calculated by Alcan Pacific Co. to end March 2, 1961, in lieu of February 28.

In conclusion, we request that our appeal is not dismissed on the grounds that it was not timely submitted. It is our contention that the Contracting Officer was conscious of our intent to appeal his decision on the strength of previous correspondence referred to above, and a four-day mis-calculation on the part of the Contractor to transmit a letter of appeal in our opinion does not give justification to recommend an appeal for dismissal of our claim.

It is herewith most respectfully requested that the Contracting Officer reconsider his recommendation for dismissal to the Board of Contract Appeals, and that the appeal be considered on its own merit.

Yours very truly,

ALCAN PACIFIC Co.,
WILLIAM G. JONES
General Superintendent.

On March 31, 1961, the contracting officer notified the contractor as follows:

Reference is made to your letter of March 27, 1961.

The matter has been submitted to the Board of Contract Appeals and a Department Counsel will be appointed shortly to represent the Government in the appeal. Your letter of March 27 will be forwarded to him and he will contact you before any further action is taken on your appeal.

In the meantime you may ignore our letter of March 17, as it will be up to the Board of Contract Appeals to determine whether your appeal was timely filed.

For your convenience we are attaching a copy of the regulations pertaining to appeals before the Board of Contract Appeals.

Based on the record, the Board finds:

1. The letter of January 25, 1961, constituted a decision within the meaning of Clause 37 "Disputes" of the contract. It was clearly labeled as a "decision" and informed the contractor clearly concerning its appeal rights. Unless appealed within 30 days "by mailing or otherwise furnishing * * * a written appeal," the decision was final and conclusive, and the Board is without jurisdiction to review the contracting officer's decision.²

2. The letter of January 7, 1961, of the contractor to the contracting officer cannot be considered as a valid notice of appeal since it was premature. No contracting officer's decision was, as yet, in existence. The rule stated by this Board in *Seal and Company*³ is applicable:

As the Board's jurisdiction is appellate, it is the general rule that there must be a decision by the contracting officer before there can be an appeal, and that a notice of appeal prematurely filed is not validated merely by the subsequent rendition of a decision on the same subject as that covered by the notice.

² *Poloron Products, Inc. v. United States*, 126 Ct. Cl. 816, 826 (1953). This Board held in *Refer Construction Company*, IBCA-209, October 20, 1960, 67 I.D. 457, 461, 60-2 BCA par. 2831, 2 Govt. Contr. 561, that "provisions of the nature as those contained in Clause 6 'Disputes' * * * are jurisdictional and thus would preclude review of a contracting officer's decision upon questions of fact arising under the contract unless an appeal is taken within the 30 days allowed for that purpose." Accord: *E. D. Weiner Transport Aircraft*, ASBCA No. 6564, February 21, 1961, 61-1 BCA par. 2955.

³ IBCA-181, February 24, 1960, 67 I.D. 60, 62, 60-1 BCA par. 2521, 2 Govt. Contr. par. 150.

May 8, 1961

To be sure, there are exceptions to the rule. But the instant case does not come within the compass of the exceptions.⁴

3. The exception in the release taken by the contractor on February 22, 1961, is only preservative in nature and is not effective as a notice of appeal.

4. The language used by the contracting officer in transmitting the release on January 31, 1961, was of no effect, since there is an implication therein that a valid appeal had already been taken. This action of the contracting officer did not, in our opinion, mislead the contractor, since it was not this letter of the contracting officer which resulted in an untimely appeal, but a "miscalculation" of the appeal period on its part, as the contractor admits in his letter of March 27, 1961. Consequently, the letter of January 31, 1961, is of no effect.⁵ It does not confer any rights on the contractor, nor does it impose jurisdiction on the Board.⁶

5. The Notice of Appeal of March 2, 1961, was mailed after the expiration of the appeal period. The reason given by the contractor that he miscalculated the time for taking the appeal does not affect the running of the appeal period.⁷ We are in full agreement with the holding of the Armed Services Board of Contract Appeals in *Reading Clothing Manufacturing Company*:⁸

The Board has consistently found that an appeal is untimely when filed subsequent to the 30-day period even though the delay might be as short as one day.

Where, however, some action has been taken by the contractor within the 30-day period, the Board has been faced as here with a determination as to whether or not such action constitutes an appeal. * * *

* * * the Board had been consistent in requiring not only some action by the contractor within the 30-day appeal period indicating his dissatisfaction or disapproval of the action of the contracting officer, but, in addition, his present intent within the 30-day period to appeal to the Secretary or at least to an authority superior to the contracting officer. The Board has taken a liberal view of actions by contractors to file such an intention and such appeal. However, such intention must be evident and must be actual. The Board has no authority to waive the rights of the Government, and in the line of the decisions referred to has not done so. It will be noted that the "Disputes" article provides

⁴ *Ibid.*

⁵ *Cf. The Tire Mart*, ASBCA No. 5671, March 15, 1960, 61-1 BCA par. 2582.

⁶ *Cf. McGraw-Hill Book Company, Inc.*, ASBCA No. 4500, July 7, 1958.

⁷ *Cf. Joy, The Disputes Clause in Government Contracts: A Survey of Court and Administrative Decisions*, 25 Fordham L. Rev. 11, 29 (Spring 1956): "The thirty day appeal period closely resembles a statute of limitations. Illness of an appellant affords no excuse for failure to appeal within the prescribed period. The fear of a contractor, that by appealing, he will incur the enmity of the contracting officer likewise does not excuse a failure to appeal." Citing *Fraser Engineering Co.*, ASBCA No. 3001 (1955); *MacLean Industries, Inc.*, ASBCA No. 1964 (1955); and *Perry McGlone v. United States*, 96 Ct. Cl. 507, 540 (1942); *American Bridge Co. v. United States*, 25 F. Supp. 714 (W.D. Pa. 1938), respectively.

⁸ ASBCA No. 3912, May 7, 1957, 57-1 BCA par. 1290.

that the decision of the contracting officer is final and conclusive if no appeal is taken within the 30 days. Upon the expiration of that period without such an appeal, the rights of the Government become fixed and the Board is powerless to render relief. *The liberality evidenced in some of these decisions is not a liberality of the Government's rights but rather a liberal interpretation of the appellant's acts. It is the appellant and the appellant alone who can protect his rights under the contract. Where he fails by neglect or design or inadvertence to do so, this Board is powerless to assist him.*" (Italic supplied.)

The contractor-appellant admits that he "miscalculated" the appeal period, and that the letter of March 2, 1961, was mailed after the appeal period had elapsed.

We have reviewed the numerous decisions dealing with the "time-lines of appeal" and agree with the conclusion reached in *Nilson-Smith Construction Company and Northwestern Engineering Company*,⁹ that boards "are, of necessity, strict in determining whether a particular appeal was mailed within the prescribed 30-day period, but *liberal*"¹⁰ in determining whether a particular writing constitutes an appeal." (Italics supplied.)

Since the appeal was not filed within the 30-day period, as provided in the "Disputes" Clause 37 of the contract, the Board is without authority to act on the merits of this appeal.¹¹

Consequently, the motion to dismiss is granted, and the appeal is hereby dismissed.

PAUL H. GANTT, *Chairman.*

We concur:

THOMAS M. DURSTON, *Member.*

JOHN J. HYNES, *Member.*

APPEAL OF REFER CONSTRUCTION COMPANY

IBCA-267

Decided May 19, 1961

Contract: Damages: Liquidated Damages

Liquidated damages provisions in contracts are valid and enforceable regardless of the actual damages suffered by the Government in the event of a delay in the performance of the contract. The absence of actual damages is not fatal to the Government's enforcement of liquidated damages and does not convert liquidated damages into penalties.

Contracts: Generally

Interest cannot be recovered against the United States upon unpaid accounts or claims in the absence of an express provision to the contrary in a relevant statute or contract.

⁹ Eng. C & A Board No. 1471, June 13, 1958.

¹⁰ *Midland Constructors, Inc.*, IBCA-272, May 3, 1961.

¹¹ *Rea Construction Company*, IBCA-227, November 4, 1960, 60-2 BCA par. 2847, 2 Govt. Contr. 592.

May 19, 1961

BOARD OF CONTRACT APPEALS

On October 20, 1960, the Board denied the motion to dismiss of the Department Counsel and remanded the matter to the contracting officer with the directive to set aside its letter decisions of May 28, 1959 and June 15, 1959, and to issue a findings of fact and decision responsive to the allegations of the contractor-appellant, including the allegations that there may have been substantial compliance with the notice requirements of Clause 5 (c) of Standard Form 23A.¹

The contracting officer issued a document entitled "Findings of Fact" on January 11, 1961. It contained an appropriate "caveat" and had appended to it a copy of the rules governing the procedures before the Board of Contract Appeals.

The contractor and its attorney appealed timely from the decision of the contracting officer on January 13, 1961.

On March 24, 1961, the Department Counsel submitted to the Board a statement of the Government's position and presented simultaneously a motion to dismiss Claims Nos. 4 and 7. Copies of these instruments were served on the attorney for appellant. No statement has been received from appellant since the filing of the motion.

In the Findings of Fact of January 11, 1961, appear dispositions concerning seven (7) claims. The Board will follow the numbering of the claims employed by the contracting officer.

Claim No. 4—Liquidated Damages

Contractor-appellant contends that since no actual damage was suffered by the Government because of the delay in completion of the contract the liquidated damages provision is not enforceable as being in the nature of a penalty. In the appeal of January 13, 1961, appellant states:

In answer to Claim No. 4, the Contracting Officer admits that no damage resulted to the United States.

We agree with the Department Counsel, that the disposition of this "claim" is governed by the holding of the Supreme Court of the United States in *Priebe & Sons v. United States*:²

Today the law does not look with disfavor upon "liquidated damages" provisions in contracts. When they are fair and reasonable attempts to fix just compensation for anticipated loss caused by breach of contract, they are enforced. * * *

They serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable, as is the case in many government contracts. * * *

¹ IBCA-209, October 20, 1960, 67 L.D. 457, 463, 60-2 BCA par. 2831, 2 Govt. Contr. 561.

² 332 U.S. 407, 411-12 (1947).

And the fact that the damages suffered are shown to be less than the damages contracted for is not fatal. These provisions are to be judged as of the time of making the contract.

This Board has, of course, followed *Priebe*. The validity and the interpretation of the liquidated damages provision has been before the Board several times.

In *Parker-Schram Company*,³ the Board held:

As for the contentions of the appellant with reference to the validity and effect of the liquidated damages provision itself, they are entirely without merit. These questions must be determined under federal law, rather than under the law of Oregon, as the appellant contends, and under federal law it is quite immaterial that, as matters turned out, the Government suffered no inconvenience as the result of the delay, or that the appellant would be subjected to hardship by the imposition of the liquidated damages. It is true that even under federal law a liquidated damages provision will not be enforced if in fact it constitutes a penalty. But to justify such a conclusion it must be established that it is plainly without reasonable relation to any probable damage which could follow from a delay in performance, and the circumstances of the present case would hardly warrant such a conclusion. Indeed they show that the need for the access road was urgent, especially in view of the severance of the existing access road—a fact which the appellant does not now challenge. As for the rate of the liquidated damages, the practice is to enforce it as written, for a contractor should not lightly be permitted to repudiate a rate to which it has itself agreed. It has been held that in construing a liquidated damages provision there must be indulged a presumption, arising from the very incorporation of the provision in the contract, that it had been premised upon due consideration of all the attendant circumstances. * * *

In *Truar Machine & Tool Company*,⁴ the Board stated:

As the validity of a liquidated damages provision depends on the situation which existed when the contract was made, as was held in *Priebe & Sons* * * * the mere fact that the extent to which damage was actually sustained by the Government becomes uncertain is not sufficient to make the liquidated damages provision unenforceable as a penalty. For all that appears to the contrary, the Government could have incurred, for example, increased expenses in inspecting items to be furnished under the supply contract, even though there was no delay in the installation of any of these items.

In summary, the purpose of a liquidated damages provision is simply to establish in advance the damages to be paid in the event of a delay in the performance of the contract. If the damages which would probably result are uncertain in amount and would be difficult to ascertain, and if the sum fixed *in lieu* thereof is a reasonable approximation of the damages which would probably result from a breach, the liquidated damages are valid and enforceable according to its terms,

³ IBCA-96, April 7, 1959, 66 I.D. 142, 146, 59-1 BCA par. 2127, 1 Govt. Contr. par. 289, 563 N.

⁴ IBCA-195, July 21, 1959, 59-2 BCA par. 2280, 1 Govt. Contr. 563.

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regardless of the actual damages caused by the breach.⁵ The absence of actual damages is not fatal and does not convert a liquidated damages provision into a penalty. No proof of damages is necessary. Consequently, the motion of Department Counsel is granted. That part of the appeal which is described as Claim No. 4 is dismissed.

Claim No. 7—Interest

Appellant states in its appeal of January 13, 1961:

In answer to Claim No. 7, the Contracting Officer denies that there is any interest due. It is interesting in this letter to note that the Contracting Officer in his findings of fact in no way mentions or attempts to justify the fact that \$4,717.00 was withheld in addition to the \$1,700.00 penalty without any justification or reason for more than one year and was not paid until demand was made for a reason for the non-payment. If the Contracting Officer fails to give any reason why an undisputed amount due a Contractor is withheld for more than one year, then we must assume that the only reason he withheld it is because the Contractor has appealed the penalty clause, and he, in the language used in page 10 of the decision of the Board of Contract Appeals, was using this as a shillalah to strike the Contractor down.

Assuming, without so holding that these allegations were proven, then the failure of the contracting officer to pay in accordance with the terms of the contract would constitute a breach of contract. Since the Board's jurisdiction must be found within the four corners of the contract, and does not extend to breaches of contract, the appeal would have to be dismissed for lack of jurisdiction.

A further reason for the dismissal is based on the "traditional rule that interest cannot be recovered against the United States upon unpaid accounts or claims in the absence of an express provision to the contrary in a relevant statute or contract."⁶ Consequently, the motion of the Department Counsel is granted and the appeal concerning the denial of Claim No. 7 is dismissed.

CONCLUSION

1. The motion of the Department Counsel to dismiss the appeals concerning Claims Nos. 4 and 7 is granted. These appeals are dismissed.

⁵ *Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 411-12 (1947); *Wise v. United States*, 249 U.S. 361 (1919); *United States v. Bethlehem Steel Co.*, 205 U.S. 105, 120-21 (1907); *Sun Printing & Publishing Association v. Moore*, 183 U.S. 642 (1902); 29 Comp. Gen. 530 (1950); 28 Comp. Gen. 435 (1949); *Stein-Tobler Co.*, ASBCA No. 352, March 27, 1952.

⁶ *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585, 588 (1947). *Accora v. United States v. Alcoa Band of Tillamooks*, 341 U.S. 48 (1951); *Komatsu Manufacturing Co. Ltd. v. United States*, 132 Ct. Cl. 314 (1955); *Ramsey v. United States*, 121 Ct. Cl. 426 (1951), cert. den. 343 U.S. 977 (1952); *Flora Construction Company*, IBCA-101, September 4, 1959, 66 I.D. 315, 320, 59-2 BCA par. 2312; *Montgomery Construction Company*, ASBCA No. 2556, January 23, 1956; 17 Comp. Gen. 526 (1937).

2. The Board will receive additional statements and briefs of the parties concerning Claims Nos. 1-3, 5, and 6, if they are submitted to the Board prior to June 23, 1961.
3. If no additional statement and briefs are received from the parties, the Board will consider on the record as submitted Claims Nos. 1-3, 5, and 6.

PAUL H. GANTT, *Chairman.*

I concur:

THOMAS M. DURSTON, *Member.*

APPEAL OF ALLIED CONTRACTORS, INC.**IBCA-265***Decided May 16, 1961***Rules of Practice: Appeals: Dismissal—Contracts: Delays of Contractor—
Contracts: Notices**

A motion by the Government for dismissal of an appeal on the grounds that the contractor failed to give timely written notice of the cause of a delay in performance will be denied, where it appears that the contracting officer had prior actual knowledge of the cause of the delay.

Rules of Practice: Appeals: Dismissal—Contracts: Breach

Where the Government failed to cause clearance work to be performed by others as provided by the contract so as to make the work site available to the contractor, the latter's claim for damages caused by the delay will be dismissed as being a claim for breach of contract.

Rules of Practice: Appeals: Dismissal—Contracts: Changes and Extras

An appeal will not be dismissed where the site for disposal of excavated material as provided by the contract specifications is made unavailable to the contractor and the later selection by the Government of an alternate site creates an issue of fact as to the existence of a constructive change order.

BOARD OF CONTRACT APPEALS

Department Counsel has submitted a "Statement of Government's Position and Brief" which is construed as a motion to dismiss the appeal, since it challenges the jurisdiction of the Board over two money claims submitted by the contractor as being untimely and as representing unliquidated damages for alleged breach of contract. Also, the final paragraph of the Statement of Government's Position and Brief reads as follows:

The decision of the Contracting Officer is sufficient under the law and the facts and would justify this Honorable Board in dismissing the appeal.

No reply brief has been submitted by the appellant in answer to Department Counsel's statement and brief or in opposition to the motion for dismissal of the appeal.

However, 43 CRF 4.7(c)¹ makes the filing of a reply brief an optional matter for the contractor, and many appellants fail to take advantage of the opportunity to file reply briefs. Such failure merely leaves the contractor in the position of neither admitting nor denying the allegations contained in the Government's motion.²

Although the arguments advanced by Department Counsel pertain only to the monetary claims, the purported request for dismissal is

¹ (c). Within 15 days after receipt of the statement and brief of the department counsel, the contractor may file with the Board a reply thereto.

² *Midland Constructors, Incorporated, IBCA—272 (May 3, 1961).*

apparently directed to the appeal as a whole, on the basis of the allegation that "The decision of the Contracting Officer is sufficient under the law and the facts* * *." There are several other claims involving alleged excusable delay, which concern issues as to material facts, except for one alleged to have been untimely presented. Accordingly, the Board will not dismiss the appeal as to those matters.³

Claim No. 8, alleged by the contracting officer to have been untimely presented, is for excusable delay caused by unusually severe weather and floods. Clause No. 5 of Standard Form 23A (March 1953) provides that "* * * the Contractor shall within 10 days from the beginning of any such delay, unless the Contracting Officer shall grant a further period of time prior to the date of final settlement of the contract, notify the Contracting Officer in writing of the causes of delay. * * * "

Claim No. 8 was apparently first presented in writing by the contractor's letter of September 21, 1960. "Payment Estimate No. 7 - Final" is dated November 23, 1960, so the claim was presented prior to final settlement. Moreover, it is stated in the contracting officer's Findings of Fact and Decision that: "A review by the log kept by Mr. Houghwout, the inspector, discloses that there were very few days on which work was not performed because of unusually heavy snows, the extremely high flood tide in the Potomac River and rain and that the weather conditions and high tides were not unusual for the months of March and April and were not unforeseeable. * * * "

Thus, the contracting officer seems to admit, perhaps inadvertently, that the work was delayed by "unusually heavy snows."

Since the weather conditions were apparently within the actual knowledge of the contracting officer, the Board will not dismiss the appeal for non-compliance with the technical requirement of the 10-day limitation.⁴ It may be observed in passing that the actual records of the Weather Bureau have not been proffered by either party concerning the question of "unusually severe weather," although the contractor has referred to March 1960 as breaking all records. It does not appear that such records were consulted by the contracting officer in arriving at the conclusion that the weather conditions and high tides were not unusual, or unforeseeable. The burden of proof, of course, will be on the appellant to support its claim at the hearing which appellant has requested.⁵

³ *Cheney-Cherf and Associates*, IBCA-250 (November 14, 1960), 67 I.D. 396, 400, 60-2 BCA par. 2583, 2 Govt. Contr. par. 620(a), and cases cited therein. (The claims involved are about 20 in number and are listed in detail in the Findings of Fact and Decision dated November 23, 1960).

⁴ *Cf. Studer Construction Company*, IBCA-95 (December 11, 1959), 66 I.D. 414, 2 Govt. Contr. par. 25; *Cheney-Cherf and Associates*, Fn. 3, *supra*; *Sanders*, BCA No. 955, 3 CCF 862, 923 (1945).

⁵ *Cf. Pioneer Electric Company, Incorporated*, IBCA-222 (June 23, 1960), 67 I.D. 267-70, 60-2 BCA par. 2675, 2 Govt. Contr. par. 368, and cases cited therein.

May 16, 1961

One of the monetary claims (unnumbered) is for \$2,547.83 costs of idle equipment, incurred by reason of the alleged 14 calendar days delay of the Government in furnishing an alternate site for disposal of excess excavated material. Paragraph 5B-4 Utilization, of Section 5B, Excavation Other Than Structural, of the contract, required that excess excavated material "be placed on the Mole in the vicinity of the future Water Sports Center as directed." Apparently because of delay of the contractor-appellant in starting the work, construction of the Mole was performed by another contractor. The completion of the Mole by the other contractor deprived appellant of the site for disposal of excess excavated material. However, the contractor needed an alternate site; it alleges that the Government failed to provide this site within a reasonable time. This alleged delay is also the subject of Claim No. 4 for extension of time for performance. The contractor notified the contracting officer of this delay by letter of April 25, 1960 and submitted its claim in letter of September 21, 1960, prior to final settlement. We hold this to be timely (see fn. 4, *supra*).

Without going into the merits of this claim, it would seem to the Board that there may be involved a question of fact as to whether a constructive change order came into being. The completion of the Mole by another contractor made it necessary to provide the appellant with a change in the authorized place for disposal of excess excavation material. That change was made, and it would appear that the proper adjustment for additional costs, if any, of such change may involve a change to be made under Clause No. 3, "Changes."⁶ The question of Government liability for standby costs of idle equipment is a separate matter, not decided here.

The second monetary claim presents a different type of situation. It is for costs of alleged delay by the Government in causing the removal of electric power poles from the work site. In a companion Claim No. 5, the appellant asks for an additional extension of time for excusable delay.

Under Section 5B "Excavation Other Than Structural" of the contract, paragraph 5B-Scope provides in the last sentence that " * * * The work area will be cleared and grubbed by others prior to beginning of construction." The contracting officer allowed an extension of 12 calendar days excusable delay. The appellant claims costs of \$4,586.09

⁶ Cf. *Inter-City Sand and Gravel Company and John Kovtynovich*, IBCA-128 (May 29, 1959), 66 I.D. 179-99, 59-1 BCA par. 2215, 1 Govt. Contr. par. 432; *Regent Manufacturing Company, Incorporated*, ASBCA No. 5397, 61-1 BCA par. 2956 (February 23, 1961); *Unexcelled Chemical Corporation*, ASBCA No. 2399, 60-1 BCA par. 2587 (March 31, 1960); *H&O Research & Development Corporation*, ASBCA No. 5013, 59-1 BCA par. 2107 (February 25, 1959); *J. W. Hurst & Son Awnings, Inc.*, ASBCA No. 4167, 59-1 BCA par. 2095 (February 20, 1959).

for 24 calendar days delay, apparently because of standby costs of idle equipment.

It is clear that there was no change in the scope of the work concerning the relocation of the poles. That work was to be done by others, and the contractor was not authorized to perform such work nor did it actually remove or relocate the poles. The contract contains no provisions for additional compensation for such a delay. Therefore, the contractor's claim is based on an alleged breach of the Government's agreement to clear the work area prior to beginning of construction so as to make it available for the contractor's work. This type of claim is outside of the jurisdiction of the Board and must be dismissed.⁷

CONCLUSION

The motion to dismiss the appeal is granted as to the claim of \$4,586.09 for delay in removal of poles. The motion is denied as to the remainder of the claims in this appeal.

THOMAS M. DURSTON, *Member*.

We concur:

JOHN J. HYNES, *Member*.

PAUL H. GANTT, *Chairman*.

APPEAL OF KENNETH HOLT, AN INDIVIDUAL d/b/a NORTHOLT ELECTRIC COMPANY and WILLIAM COLLINS & SONS, INC.

IBCA-279

Decided May 26, 1961

Contracts: Delays of Government

It is well settled that a claim for additional compensation based on the alleged delay of the Government in performing its contractual obligation is a claim for breach of contract.

Rules of Practice: Appeals: Dismissal

The Board does not have jurisdiction to administratively determine appeals involving breaches of contract. Such appeals must be dismissed.

BOARD OF CONTRACT APPEALS

Department Counsel has moved on May 22, 1961, that the Board—dismiss the instant appeal and request for review on the ground that all of the appellant's involved claims are for unliquidated damages exclusively and, there-

⁷ *Central Florida Construction Company*, IBCA-246 (January 5, 1961), 61-1 BCA par. 2903; 3 Govt. Contr. par. 40; *Seal and Company*, IBCA-181 (December 23, 1960), 67 I.D. 435, 61-1 BCA par. 2887; 3 Govt. Contr. par. 39; *Platte Valley Construction Company*, IBCA-168 (August 28, 1958), 58-2 BCA par. 1892. (These cases involve withholding by the Government of access to or availability of the work site from the contractor. There are other decisions holding to the same effect, cited by Department Counsel, involving delay by the Government in the furnishing of materials or equipment to the contractor.)

May 26, 1961

fore, beyond the jurisdiction of the Board to serve as a basis for granting any of the relief requested by the appellants.

Appellant filed an appeal on March 27, 1961, from a letter decision of the contracting officer of March 8, 1961.

That decision recites that the contractor entered the following exception on the release under the contract:

\$48,187.51 representing claim for damages and extra costs resulting from or incurred by reason of breach of contract or due to delayed delivery of government furnished materials claim attached hereto.

The notice of appeal of March 27, 1961, which was executed by the appellants on the stationery of the law firm of Wattam, Vogel, Vogel, Bright & Peterson, Esqs., of Fargo, North Dakota, and the supplemental notice of appeal and request for review of April 4, 1961, of Edward C. Gillig, Esq., described the claim of appellants in similar terms. We quote, in part, from the latter instrument:

The said contracting officer's findings and decisions that said contractors' claim is a claim for unliquidated damages and one which said contracting officer has no authority to entertain or settle, and that it is unnecessary for him to prepare findings of fact or determine whether said contractors incurred damages or extra costs, are deemed erroneous by said contractor, and they appeal therefrom and request a review thereof because: They believe and submit that due to the government's *breach of contract and failure to furnish materials within specified times* and fulfill its obligations so as not to impede performance by the contractors, and the resulting delays and costs incurred by said contractors, they sustained *damages* in the sum of \$48,187.51, as set forth in their claim, dated December 23, 1960 * * * further, because said contractors believe and submit that they are entitled to recover and be paid and reimbursed for such * * * contractors desire to have settled and determined all questions of fact, and all facts out of which their claims arose, and all matters which they are entitled to have considered and settled by governmental administrative agencies, and take advantage of and exhaust all administrative remedies available to them under said contract or otherwise, and obtain the final decision¹ of the proper administrative agencies of the government * * *. (Italics supplied.)

The rule stated by the Board in *Ideker Construction Company*,² is dispositive of this appeal:

It is well settled that a claim for additional compensation based on the alleged delay of the Government in performing its contractual obligations is a claim for a breach of contract, which is beyond the authority of an administrative official, such as the contracting officer or this Board, to determine.

¹ The authority exercised by the Board is final for the Department of the Interior (43 CFR 4.4). *Carson Construction Company*, IBCA-21, 25, 28 and 34, March 9, 1956, p. 34. In *Adler Construction Company*, IBCA-156, January 20, 1960, 67 I.D. 21, 60-1 BCA par. 2512, 2 Govt. Contr. 115 it was held that a request for reconsideration is unnecessary to exhaust administrative remedies.

² IBCA-124, October 3, 1957, 64 I.D. 388, 389, 57-2 BCA par. 1441.

We also cite with approval the following statements from *Weardco Construction Corporation*:³

In the last analysis, the question presented by the instant appeal is whether in the circumstances here involved an award of additional compensation is authorized by any of the provisions of the contract. The answer to that question must be in the negative. On the other hand, appellant seems to assert that, if it is not entitled to additional compensation *under* the contract, then it must be entitled to additional compensation for breach of contract. Here appellant appears to have in mind decisions in which the Court of Claims has held that where the Government negligently fails to make timely delivery of promised material, and thereby unduly delays performance of the contract work, the extra costs incurred as a result may be recovered by the contractor in a suit against the Government for breach of contract.⁴ But those decisions do not mean that administrative officers of the Government, such as the contracting officer or the Board, are authorized to consider and settle unliquidated damage claims of this sort for which no provision is made in the contract itself. Quite to the contrary, it is well established that the powers conferred on administrative officers by the standard Government contract forms do not extend to the allowance of claims for unliquidated damages on account of alleged breach of contract.⁵ The contracting officer accordingly was right in concluding that, absent any ground for the allowance of additional compensation *under* the contract, the instant claim must be regarded as one for breach of contract which he did not have authority to consider or settle. Since the Board lacks jurisdiction to determine the merits of a claim of this character, no opinion is expressed upon the question whether the delay in furnishing the venturi meter tubes was caused by such a want of diligence, or other fault, on the part of the representatives of the Government as would amount, * * *.

Consequently, the motion of the Department Counsel to dismiss is granted. The appeal is hereby dismissed for lack of jurisdiction.

PAUL H. GANTT, *Chairman*.

I CONCUR:

THOMAS M. DURSTON, *Member*.

CLAIM OF WAYNE H. MORRISON

TA-220

Decided May 29, 1961

Torts: Common Carriers—Torts: Trespass—Torts: Contributory Negligence

Where a Government employee operating automotive equipment on a Government railroad, after observing a private automobile parked on the right-

³ IBCA-48, September 30, 1957, 64 I.D. 376, 384, 57-2 BCA par. 1440, 2 Govt. Contr. 373.

⁴ *William C. Thompson v. United States*, 130 Ct. Cl. 1 (1954); *Chalender v. United States*, 127 Ct. Cl. 557 (1954); *Harwood-Nebel Construction Co., Inc. v. United States*, 105 Ct. Cl. 116 (1945).

⁵ *Wm. Cramp & Sons v. United States*, 216 U.S. 494 (1910); *Continental Illinois Nat'l Bank & Trust Co. v. United States*, 126 Ct. Cl. 631, 640-641 (1953); *Anthony P. Miller, Inc. v. United States*, 111 Ct. Cl. 252, 329-330 (1948); *Arthur W. Langevin v. United States*, 100 Ct. Cl. 15, 29-31 (1948); *A. S. Horner Construction Co.*, 63 I.D. 401 (1956).

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of-way dangerously close to the tracks, causes a collision by failing to approach the automobile at a speed that will permit the equipment to be stopped if the room for passage turns out to be insufficient, the United States is liable for the resulting damages to the automobile, even though its owner may have been a trespasser in parking it on the right-of-way, and also, may have been contributorily negligent in parking it so close to the tracks.

APPEAL FROM ADMINISTRATIVE DETERMINATION

On February 28, 1961, the Field Solicitor for The Alaska Railroad denied the claim of Wayne H. Morrison, 224 Craig Street, Fairbanks, Alaska, in the amount of \$393, for compensation because of damage to his 1956 Plymouth automobile. The damage resulted when the blade of a D-7 tractor being hauled by a rail gas car of The Alaska Railroad, hereinafter referred to as the "railroad," collided with the claimant's automobile, while parked about 51 inches from the nearest rail of the railroad tracks. The claimant has taken a timely appeal to the Solicitor from the administrative determination of the Field Solicitor (T-ARR-110).

The incident on which the claim is based occurred at approximately 11:12 a.m., on June 22, 1960, on the railroad right-of-way, a distance of about 200 feet from the Meridian railroad crossing, Ladd Air Force Base. The right-of-way in this area is 28 feet wide—14 feet on either side of the center line of the track. In this area, a Department of the Air Force road parallels the right-of-way. The road consists of a 40-foot "black top" strip with a 20-foot gravel strip on either side of it. At the point where the incident occurred the edge of the gravel strip was about 11 feet from the center line of the right-of-way, thus overlapping the latter by about three feet.

The claimant, while on his way to work on the day of the accident, ran out of gas on the road just mentioned. He states that "he used the starter to get the car clear of the air strip and left it parked 51 inches away from the nearest rail." He also states that when he returned, after walking to his duty station and obtaining gas, the accident had occurred.

The railroad gas car was pulling a trailer loaded with a tractor as it approached, at a speed of approximately five miles per hour, the area where the claimant's car was parked. The operator of the gas car, having observed the parked car, felt that he had ample clearance to pass it safely but as he came within one rail of it, he decided that there was not sufficient clearance to pass the car and at the same time the second member of the train crew called out "Hold it." The operator thereupon applied the brakes of the gas car, but, before he could bring it and the trailer to a stop, the blade of the tractor caught

the right-rear fender of the claimant's car, causing the damage here in question. The record indicates that, while 51 inches would have been sufficient clearance for the passage of an ordinary train, it was here insufficient because the tractor blade, being 13 feet wide, projected beyond the side of the trailer.

At the time of the accident, the claimant was a noncommissioned officer in the United States Air Force and was stationed at the Ladd Air Force Base. His claim was rejected by the Field Solicitor on the ground that he had no authority or permission to use that part of the railroad right-of-way where his car was parked and, therefore, was a trespasser on the right-of-way at the time of the accident, and also on the ground that he was negligent in parking his car so close to the track.

The operator of the rail gas car has admitted that prior to the accident he saw the claimant's car parked by the side of the railroad track and believed "there was clearance but blade of cat [referring to the tractor] caught right rear fender damaging same." It is clear from the record that the operator of the gas car observed the dangerous proximity of the claimant's car to the railroad track in time to have avoided the collision, but misjudged the clearance and so failed to apply the brakes until it was too late to slow down or stop the gas car and trailer.

In the circumstances of the present case, it is immaterial whether the claimant was a trespasser, since the damage to his car was due to a failure by the operator of the railroad gas car to use reasonable care *after* the presence of the claimant's car was discovered. It is well settled that a "possessor of land, who is in immediate control of a force, and knows or, from facts within his knowledge, should know of the presence of trespassers in dangerous proximity thereto, is subject to liability for bodily harm thereby caused to them by his failure to exercise reasonable care (a) so to control the force as to prevent it from doing harm to them, or (b) to give a warning which is reasonably adequate to enable them to protect themselves."¹

Nor is it material whether the claimant was negligent in parking his car so close to the railroad track, since the operator of the gas car had the last clear chance to avoid the collision. In *Northern Pac. Ry. Co. v. Everett*,² the United States Court of Appeals for the Ninth

¹ RESTATEMENT, TORTS sec. 338 (1934). The comments to this section contain the following explanation: "The rule stated in this Section applies to any moving force over which the possessor is in immediate control, in so far as the force is connected with a condition created or maintained by him." The rule extends to property damage as well as to bodily harm. RESTATEMENT, TORTS sec. 497 (1934). Accord, *Guy P. Kearns*, 61 I.D. 219, 222 (1953).

² 232 F. 2d 488, 493 (1956). See, e.g., *Black v. Texas & Pac. Ry. Co.*, 108 F. Supp. 443, 446 (E.D. La. 1952), *aff'd*, 203 F. 2d 574, 576 (5th Cir. 1953); *Patenotte v. New Orleans Pub. Belt R.R. Comm.*, 118 No. 2d 270 (La. 1960); *Burger v. T. Smith & Son, Inc.*, 93 So. 2d 34, 36 (La. 1957); *St. Louis-S.F. Ry. Co. v. Van Hoy*, 268 1 p. 2d 582, 584-85

May 29, 1961

Circuit in considering the doctrine of last clear chance said:

This doctrine applies * * * when both parties are negligent but one party, seeing the peril of the other and appreciating the danger, fails to exercise due care to avoid injury.

Liability is then cast on the party who, appreciating the danger, had the later chance to avoid the injury, even though the other's negligence may have continued up to the instant of the injury.

Applying the foregoing recognized principles of law to the matter under consideration, I determine that the operator of the railroad gas car, while acting within the scope of his employment, failed to use reasonable care in a situation where a duty to exercise such care was owed to the claimant, and that, as the operator had the last clear chance to avoid the collision, allowance of the claim is not precluded by contributory negligence on the part of the claimant.

It is therefore my opinion that the decision of the Field Solicitor should be reversed and the claim allowed in an appropriate amount.³

The amount of \$300.39, which is the lower of the two estimates submitted by the claimant, appears reasonable.

FINAL DETERMINATION

Therefore, the administrative determination (T-ARR-110) of the Field Solicitor for The Alaska Railroad is reversed. I award Wayne H. Morrison the sum of \$300.39, and I direct that this amount be paid to him, subject to the availability of funds for such purpose.

EDWARD W. FISHER,
Deputy Solicitor.

(Okla. 1954); *Thompson v. Updegraff*, 255 1 p. 2d 912, 913 (Okla. 1953); cf. *Alaska Freight Lines v. Harry*, 220 1 F. 2d 272, 275 (9th Cir. 1955). The case last cited arose under Alaska law.

³ In denying the claim, the Field Solicitor relied on the rulings in (1) *Firfer v. United States*, 208 F. 2d 524 (D.C. Cir. 1953) and *Carbone v. Mackchil Realty Corp.*, 71 N.E. 2d 447 (N.Y. 1947), both of which involved injuries resulting from a defective condition of the premises, as distinguished from active conduct of the possessor of the land or his employees; (2) *Lo Casto v. Long Island R.R. Co.*, 160 N.E. 2d 846 (N.Y. 1959), in which the court held that the doctrine of the last clear chance was inapplicable since the defendant's employees did what was reasonably necessary to avoid injury to the plaintiff; (3) *Hansen v. Cohen*, 278 P. 2d 898 (Ore. 1955), which involved an assault by an attendant on a patron of defendant's parking lot in the course of a dispute arising out of a dice game; (4) *Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29 (1944), which involved the issue of whether the evidence of negligence and causation was sufficient to present a jury question in a suit under the Federal Employers' Liability Act; (5) *Johnson v. Yazoo & Miss. Valley R.R. Co.*, 47 So. 785 (Miss. 1908), in which the court held that a passenger is not guilty of contributory negligence as matter of law in merely riding on a platform of a vestibuled train; and (6) *Rathbone v. Oregon R.R. Co.*, 66 Pac. 909 (Ore. 1901), in which the court held that the only duty the defendant owed the deceased was to exercise reasonable care not to injure him after his presence on the track was discovered. None of these decisions are inconsistent with the holdings in this determination, and the *Carbone*, *Lo Casto*, *Hansen* and *Rathbone* decisions contain statements which, in one way or another, tend to support these holdings.

APPEAL OF EMANUEL BITTERMAN

IA-1170

*Decided June 5, 1961***Indian Lands: Leases and Permits: Generally**

A purchaser of Indian lands is entitled to rentals paid by a lessee of the lands when the invitation for bids under which the purchase was made so provides, and this right is unaffected by the date when title to the land passed by patent in fee.

APPEAL FROM THE COMMISSIONER OF INDIAN AFFAIRS

Emmanuel Bitterman of Delmont, South Dakota, has appealed to the Secretary of the Interior from a decision by the Commissioner of Indian Affairs, dated November 27, 1959, declining to release to him lease rentals, in the sum of \$500.00, paid by a lessee of Indian lands for the period commencing March 1, 1959, and terminating February 29, 1960. The appellant was the purchaser of these lands.

The land involved, comprising 80 acres, is described in the record as Yankton Sioux Allotment No. 187. While the land sale advertisements, including the invitation for bids and instructions to bidders, were not included in the record submitted on this matter by the Bureau of Indian Affairs, it does appear from that record that the land was advertised for sale and sealed bids were opened at the Yankton Sub-Agency on December 11, 1958. The land sale advertisement likewise apparently provided that the land was subject to a lease which would expire February 29, 1960, and that the annual rental of \$500.00 was due on March 1, 1959. Moreover, it is reported that the invitation for bids contains the following provision:

The land advertised herein for sale will be sold subject to existing leases of record with the Bureau of Indian Affairs. Rental payments (crop or cash) will accrue to the purchaser, effective as of the beginning of the next annual lease period. In the event advance rental payments have been collected by former owner or owners, such amounts will be deducted from the purchase price.

The record shows that appellant's high bid for the above land was accepted, and an award made to him on January 27, 1959. The balance of the purchase price was paid by appellant on February 2, 1959, and the fee patent conveying title to him, as the purchaser, was issued March 17, 1959.

It was the view of field officials of the Bureau of Indian Affairs, with which the Commissioner of Indian Affairs concurred in his decision of November 27, 1959, that since the patent conveying the land in question to appellant was not issued until March 17, 1959, the former Indian owner of the land would be entitled to the lease rental paid for the period commencing March 1, 1959, and terminating February 29, 1960. It is to this conclusion that the appellant ad-

June 5, 1961

dresses his appeal, claiming that he, as the purchaser of the property, and on the basis of the invitation for bids, is entitled to such lease rental in the amount of \$500.00. There is nothing in the record to indicate that the sale of the land has been questioned, or that the lessee who paid the rentals for the period ending February 29, 1960, did not exercise his rights under the lease. In fact, appellant's notice of appeal states that such lessee took a crop off the land for that period.

It is significant that the above Commissioner's decision of November 27, 1959, from which the present appeal was taken, also covered similar situations involving other land transactions under the jurisdiction of the Aberdeen Area Office, Aberdeen, South Dakota. Moreover, in one of those closely related situations, this Department was called upon, through an appeal, to determine the rights of the parties to lease rentals from lands, also as between a former Indian owner of the lands and the purchaser of such lands. See Appeal of George H. Schmidt, IA-1171, decided October 4, 1960. There, too, the effective beginning date of a lease was March 1, and it was the view of the Commissioner of Indian Affairs that since the patent in fee in that case did not issue until March 14, thirteen days after the date when the lease rentals were due, such lease rentals belonged to the former Indian owner of the lands. In the decision of October 4, 1960, reference was made to Schmidt's contentions "that he had completed payment of the purchase price on February 18, 1957, and that any delay in the issuance of the patent was beyond his control and should not affect his right to the refund." Schmidt's appeal was allowed, and on the basis of a provision in the invitation for bids, which is identical with the quoted invitation in the present case, the following interpretation was then made:

We do not find that when title passed is controlling in this case. There is no suggestion in the language in the invitation quoted above that the purchaser must acquire title to the property by a certain date in order to be entitled to the rental payment, or credit therefor. Instead, the invitation for bids clearly and simply states that "[r]ental payments (crop or cash) will accrue to the purchaser, effective as of the beginning of the next annual lease period." * * *

In the Schmidt case the rentals were paid by the purchaser of the lands, who apparently had been a lessee of the lands, and his allowed claim was on the basis of a refund for such rentals paid by him. In the present situation, a third party, as lessee, had made the payment of the lease rentals, which we understand are being held by the field officials of the Bureau pending consideration of the present appeal. Nevertheless, in both cases the pertinent question is whether the purchaser or the former Indian owner was entitled to the lease rentals.

The slight dissimilarity in the facts of these two situations does not, in our opinion, affect the applicability of the rationale of the Schmidt decision to the present situation.

Therefore, the decision of the Commissioner of Indian Affairs is reversed, insofar as it applies to the present case. Appellant's claim, as a purchaser of the lands, to the above lease rentals covering the period March 1, 1959, to February 29, 1960, is sustained.

JOHN A. CARVER, JR.,
Assistant Secretary of the Interior.

PHOENIX TITLE AND TRUST CO. ET AL.

A-28492

Decided June 9, 1961

Private Exchanges: Public Interest

Private exchange applications are properly rejected where the offered lands are situated within the limits of an Air Force range and fee title to the lands is not required for purposes of the range and there are no compelling reasons to acquire the offered lands to augment any long range Federal resource management program; such exchanges are not in the public interest.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Phoenix Title and Trust Co. and Jess M. Pike and others have appealed to the Secretary from a decision dated April 7, 1960, whereby the Director, Bureau of Land Management, affirmed decisions of the Arizona land office dated November 24, 1959, that rejected their private exchange applications¹ on the ground that consummation thereof would not be in the public interest. The Director's decision stated in part:

The Taylor Grazing Act, as amended (43 U.S.C., 1958 ed., 315g) requires as a condition precedent to favorable consideration of any private exchange proposal that the exchange benefit the public interest. It would seem that in this case that the public interest in the offered lands is adequately met by the acquisition by the Air Force of leases to the lands for its purposes.

The privately-owned lands offered by the appellants in the private exchanges involved in this appeal are situated within the limits of the Luke-Williams Air Force Range. Apparently the use of the lands is required for purposes of the range, and the Air Force now has use of the lands through leases or condemnation of leasehold

¹ Phoenix Title and Trust Co. (AR-020828, 020829, 020830, 020831); Jess M. Pike, for himself and as Att. in Fact for 6 others (AR-021875). This case, when considered by the Director, included Lawyers Title of Phoenix, Trustee (AR-020256) but at the request of that appellant, its appeal to the Secretary was dismissed by decision A-28492a on October 13, 1960.

June 9, 1961

interests. The only issue presented by the appeal is whether the Air Force desires to acquire fee title to the offered lands through the proposed exchanges, thus enabling the exchanges to meet the requirements of the statute that such exchanges benefit the public interests before they can be approved.

To resolve this issue, this Department wrote to the Assistant Secretary of Defense, Installations and Logistics, on March 31, 1961, inquiring "whether or not it is now the intent of your Department to acquire the fee title to private lands lying within the boundaries of the Luke-Williams Air Force Range."

The Assistant Secretary of Defense replied as follows on April 17, 1961:

In view of the limiting provisions contained in the proposed legislation for land withdrawal at Luke-Williams Air Force Range, Yuma, Arizona, the need to effect private exchanges referred to in your letter of March 31, 1961, does not exist.

This determination was based not only in recognition of the policy of the Department of the Interior but also in recognition of the possible expenditures involved, thus resulting in a decision to continue present leasing arrangements as being in the best public interest.

This Department is charged with determining if it is in the public interest to acquire title to specific privately-owned lands in exchange for public lands of equal or less value (43 U.S.C., 1958 ed., 315g(b)). In implementing that function, on February 14, 1961, the Secretary approved a new land conservation policy, which is currently in effect and states in part:

Private exchanges will not be entertained or consummated except where it is shown that there are compelling reasons to acquire the offered lands to augment long-range Federal Resource Management programs.

In view of the position of the Department of Defense and the absence of any program for which the offered lands would be needed, no reasons have been presented to justify their acquisition.

Private exchange applications will be rejected when it is not established that allowance of the applications would benefit the public interest. *Somsen Brothers*, A-28210 (July 18, 1960); *Nick Chournos*, A-27812 (February 3, 1959).

The decision of the Director, Bureau of Land Management, is, therefore, affirmed.

JOHN A. CARVER, JR.,
Assistant Secretary of the Interior.

DUNCAN MILLER**A-28588***Decided June 20, 1961***Oil and Gas Leases: Applications—Oil and Gas Leases: Extensions**

An application for a single extension of a noncompetitive lease under section 17 of the Mineral Leasing Act, as amended, is not required by statute or regulation to include all of the land leased during the original 5-year term, and an application for extension covering only a portion of the leased lands may be allowed, all else being regular.

Oil and Gas Leases: Applications—Oil and Gas Leases: Extensions—Oil and Gas Leases: Relinquishments—Oil and Gas Leases: Termination

An application for the partial extension of a lease under section 17 of the Mineral Leasing Act, as amended, is not improper, and a relinquishment need not be filed to terminate the lease as to the lands for which an extension is not desired, as the lease terminates by operation of law at the end of the initial 5-year term in the absence of an application for extension.

Oil and Gas Leases: Applications—Oil and Gas Leases: Extensions—Applications and Entries: Generally—Oil and Gas Leases: Lands Subject to

The filing of an application for a single extension of a noncompetitive lease under section 17 of the Mineral Leasing Act, as amended, segregates only the lands leased during the initial 5-year lease term which are included in the extension application, and the remaining leased lands not included in the application become available for new offers upon the expiration of the 5-year term of the lease.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Duncan Miller has appealed to the Secretary of the Interior from a decision of June 10, 1960, by the Director of the Bureau of Land Management which rejected the appellant's application for a 5-year extension of his oil and gas lease pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226). The Director's decision modified a decision by the manager of the Salt Lake City land office allowing the appellant's application for the partial extension of his oil and gas lease.

At the times material here, section 17 provided in relevant part:

Upon the expiration of the initial five-year term of any noncompetitive lease maintained in accordance with applicable statutory requirements and regulations, the record titleholder thereof shall be entitled to a single extension of the lease, unless then otherwise provided by law, for such lands covered by it as are not on the expiration date of the lease withdrawn from leasing under this section. * * * A noncompetitive lease, as to lands not within the known geologic structure of a producing oil or gas field, shall be extended for a period of five years and so long thereafter as oil or gas is produced in paying quantities. * * * Any noncompetitive lease extended under this paragraph shall be subject to the rules

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and regulations in force at the expiration of the initial five-year term of the lease. No extension shall be granted however, unless within a period of ninety days prior to such expiration date an application therefor is filed by the record title-holder or an assignee whose assignment has been filed for approval, or an operator whose operating agreement has been filed for approval.¹

Effective September 1, 1954, oil and gas lease Utah 013080 was issued to Miller covering 1,280 acres of land described as the W $\frac{1}{2}$ sec. 23 E $\frac{1}{2}$ sec. 24, all sec. 25, T. 6 S., R. 20 E., S. L. M., Utah. At the end of the initial 5-year term, the lease was not within the known geologic structure of a producing field and thus entitled to the single extension for a period of 5 years authorized by section 17 since the lands were not withdrawn from leasing. August 31, 1959, was the last day for filing the extension application for the appellant's lease.

On August 21, 1959, the appellant filed a statement entitled "INFORMAL APPLICATION FOR EXTENSION LEASE NO. U-013080." The informal application stated:

A \$10.00 filing fee is enclosed herewith. Regulation application forms will be filed as soon as they are obtained describing the land to be extended.

Yours very truly,

(signed) D. MILLER

On August 31, 1959, the last day of the initial 5-year term of his lease, the appellant filed an application for extension of Utah 013080 on Bureau Form 4-1238 (May 1956), which is the form required by regulation for filing an extension application under section 17.² Item 2 on the form states: "The lands included in the lease are:." In completing item 2, the appellant wrote:

Land to be extended as follows:

T: 6, S: R 20 E.

Sec. 25, S $\frac{1}{2}$ S $\frac{1}{2}$;

43 CFR 192.120(c) provides:

(c) If during the 90 day period prior to the expiration date of the lease, the record title holder, assignee or operator files an application or request for an

¹ Section 17 was amended by the act of September 2, 1960 (74 Stat. 781), to eliminate the provision for 5-year extensions. Noncompetitive leases are now issued for a primary term of 10 years.

² 43 CFR, 1959 Supp., 192.120(b) provides: (b) The application for extension must be filed, within ninety days before the expiration date of the lease, on Form 4-1238, "Application for Extension of Oil and Gas Lease"⁵ or unofficial copies of that form in current use and must be accompanied by a filing fee of \$10 which will be retained as a service charge even though the application is later withdrawn or rejected and, unless previously paid, the sixth year's rental: *Provided*, That the unofficial copies are exact reproductions on one sheet of both sides of the official approved one-page form, and are without additions, omissions, or other changes or advertising. Form 4-1238 or a valid reproduction of the official form, will also constitute approval of the extension when signed by an authorized officer.

⁵ Filed with the Federal Register Division as part of the original document.

extension not on the prescribed form or unofficial copies thereof, or fails to file the prescribed number of copies, or pay the sixth year's rental, a notice will be issued allowing him 30 days to do so. The application will be rejected if such filing or payment is not made within the time allowed.

Rental for the sixth lease year in the amount of \$80.00 was submitted with the application, as was the required number of copies of Form 4-1238. Although the application for extension of August 31, 1959, covered only 160 acres of the 1,280 acres of land included in Utah 013080, it was a properly filed and regular application in all other respects.

On September 1, 1959, at 10:00 a.m., six persons simultaneously filed conflicting applications for the 1120 acres (W $\frac{1}{2}$ sec. 23, E $\frac{1}{2}$ sec. 24, N $\frac{1}{2}$ and N $\frac{1}{2}$ S $\frac{1}{2}$ sec. 25, T. 6 S., R. 20 E., S.L.M.) which were formerly in Utah 013080 and which were not included in the appellant's extension application of August 31, 1959. At 1:18 p.m. on September 1, 1959, the appellant filed a new offer, Utah 037362, which conflicted with the six simultaneously filed applications for the 1120 acres formerly covered by Utah 013080 and not included in the appellant's extension application. In a drawing held on September 2, 1959, to determine priority between the offers simultaneously filed at 10:00 a.m. on the previous day, Utah 037273 filed by Philip Andrews was drawn first.

On September 23, 1959, the appellant withdrew his new offer. Then on September 24, 1959, the appellant filed five copies of a second application for extension of Utah 013080 under section 17 of the Mineral Leasing Act, as amended, identical with the application filed on August 31, 1959, except that the application of September 24 covered all the land formerly included in Utah 013080. In a letter accompanying the application of September 24, Miller stated that he was enclosing "supplement extension forms" for Utah 013080. He added that since he originally filed the request for an extension not on the proper form without the full payment of rental, he was completing "the extension" within the extended time allowed.

On the following day, September 25, 1959, Miller filed a protest against any lease offers that might be filed for the lands in his lease.

Both the manager and the Director rejected the extension application of September 24 and Miller's protest. 43 CFR 192.120(c), quoted above in footnote 2, provides that if an extension application should be incomplete for failure to file on the prescribed form or for failure to submit the required number of copies, or for failure to pay the sixth year's rental, then the applicant will be notified that he must correct the defective application within 30 days. The only defects which are permitted to be corrected within 30 days of

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notice thereof are those stated in the regulation. On August 31, 1959, within the 90 days required by statute, the appellant filed an application for extension that was not deficient in any of the ways set forth in 192.120(c). The application was completely regular except that Miller applied for only a portion rather than for all of the land included in Utah 013080. 192.120(c) does not authorize the filing of a second extension application for land not included in the earlier application within 30 days after a proper extension application has been timely filed and the appellant's contentions to this effect are not meritorious.

The Director, however, not only held Miller's application of September 24 to be bad, but he also in effect rejected his application of August 31, 1959. The manager had approved that application which included only 160 of the 1,280 acres leased under Utah 013080. The Director ruled that the application was defective simply because it covered only a part of the land in Utah 013080. No reason was given for the conclusion that an extension application must cover all of the lands in the lease during the initial 5-year period, but in support of it, the case of *Mary C. Hagood et al.*, A-27716 (November 6, 1958), was cited. In the *Hagood* case, the Department held that a lessee could not partially relinquish her lease by stating that she did not intend to pay annual rental on a portion of the leased lands. The decision also held that failure to pay the entire annual rental when due under a lease which is subject to section 31 of the Mineral Leasing Act, as amended by section 1(7) of the act of July 29, 1954 (30 U.S.C., 1958 ed., sec. 188), results in the automatic termination of the entire lease.

The *Hagood* case is not comparable to the instant case and the reasons for the rule in that case do not exist in this case. The lease involved in the *Hagood* case had two years to run before its extended term would expire. The *Hagood* lease could not be terminated as to a part of the lands by a partial payment of the rental because the lease and the relevant statutory and regulatory provisions do not permit this result. In failing to pay full rental for the ninth year, Mrs. Hagood was in default under the lease; and by statute and regulation, the consequence of such a default was the automatic termination of the entire lease.³ The only way the lessee could partially terminate the lease at the beginning of the ninth lease year was to relinquish a portion of it.

³ A lease which is extended after July 29, 1954, on which there is no well capable of producing oil or gas in paying quantities is subject to the last sentence of section 31 of the Mineral Leasing Act, as added by section 1(7) of the act of July 29, 1954, which provides that upon failure of a lessee to pay rental on or before the anniversary date of the lease, the lease shall automatically terminate by operation of law (43 CFR, 1959 Supp., 192.161(a)).

In the instant case, the entire lease would have terminated at the end of August 31, 1959, in the absence of an application for extension. The question here is whether, by filing an extension application for a part of the leased land, the single extension under section 17 may be obtained for only a portion of the lands leased during the initial 5-year term without filing a relinquishment of the lands for which an extension is not desired.

In substance, an extension application is an offer to renew a lease. There is no statutory basis for requiring a lessee to renew his lease as to all of the land formerly covered therein in order to exercise his right to an extension, and no special administrative advantage or reason appears for such a requirement. In referring to the *Hagood* case, the Director's decision seems to suggest that if the appellant had filed a partial relinquishment of the lands in Utah 013080 which were not included in his extension application of August 31, 1959, the extension application would have been valid. The reason for requiring a partial relinquishment in the *Hagood* case (to prevent the entire lease from terminating for failure to pay full annual rental and to permit the lessee to continue leasing a portion of the lands) does not exist in this case. Here the initial 5-year term was about to expire whether or not the appellant took any action. It seems useless to require, as the Director's decision implicitly does, that a relinquishment of the lands for which an extension is not desired must be filed along with an application for a partial extension, since the lease expires for lands not covered by an extension application in any event. Accordingly, the appellant's extension application of August 31, 1959, for 160 acres was not defective for failure to include all of the lands leased during the initial 5-year period and the Director's rejection of that application was incorrect.

The effect of filing an application for extension under section 17 of the Mineral Leasing Act, as amended, is to segregate the land included in the application and to bar the filing of other applications for such land until action on the extension application has been noted on the tract book (*Elmer F. Garrett*, 66 I.D. 92 1959). 43 CFR, 1959 Supp., 192.120 (f) and (g), the regulations here relevant, provide:

(f) The timely filing of an application for extension shall have the effect of segregating the leased lands until the final action taken on the application is noted on the tract book, or, for acquired lands, on the official records relating thereto, of the appropriate land office. Prior to such notation, the lands are not available to the filing of offers to lease. Offers to lease filed prior to such notation will confer no rights in the offeror and will be rejected.

(g) Upon failure of the lessee or the other persons enumerated in paragraph

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(a) of this section to file an application for extension within the specified period, the lease will expire at the expiration of its primary term without notice to the lessee. Notation of such expiration need not be made on the official records, but the lands covered by such expired lease will be subject to the filing of new lease offers only as provided in § 192.43.

The regulations do not expressly provide for the situation where an application for extension is filed for only a part of the land leased during the initial 5-year term. It is clear, however, when paragraphs (f) and (g) are read together, that only lands for which an extension application has been filed are segregated by the filing of the application. There would be no purpose in providing that lands not included in an application should be segregated and unavailable for further leasing solely because they were included in a lease which also covered lands for which an extension application is filed. Accordingly, the appellant's extension application of August 31, 1959, for 160 acres of land is a proper extension application for that land, but it segregates only the 160 acres included in it. The remaining 1,120 acres formerly included in Utah 013080 became available in accordance with 192.120(g); and if all else is regular, the determination of the first qualified applicant for these lands in the order determined by the drawing held on September 2, 1959, appears proper. Thus, the appellant's protest against any lease offers for lands in Utah 013080 was properly dismissed insofar as the six offers filed at 10:00 a.m. on September 1, 1959, are concerned. This follows from the fact that the 1,120 acres of land in those offers became available for leasing at the expiration of the initial 5-year lease term because an application for extension was not filed for those lands within ninety days before the expiration date of the initial 5-year term of the lease.

For the reasons discussed herein, the decision rejecting the appellant's applications for the land in Utah 013080 is affirmed except with respect to the 160 acres of land described in the appellant's application of August 31, 1959, and the decision rejecting the latter application is reversed.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 23, Order No. 2509, as revised; 17 F.R. 6794), the decision of the Director of the Bureau of Land Management is affirmed in part, reversed in part, and the case is remanded to the Bureau for action consistent with this decision.

EDWARD W. FISHER,
Deputy Solicitor.

APPEAL OF MERRITT-CHAPMAN & SCOTT CORPORATION

IBCA-257

Decided June 22, 1961

Rules of Practice: Appeals: Effect of

A new claim first presented in appellant's brief is outside the jurisdiction of the Board, and will be remanded to the contracting officer for decision.

BOARD OF CONTRACT APPEALS

Appellant filed a timely Notice of Appeal dated October 13, 1960, from a decision dated September 16, 1960, in which the contracting officer dismissed for lack of jurisdiction a claim for additional compensation in the amount of \$767,200.00. The Notice of Appeal states, in part, as follows:

The decision is erroneous because:

This is not a claim for unliquidated damages based upon alleged delays by the government in meeting obligations; further, the Contracting Officer does have authority to settle this claim. Reasons for the above statement are amply provided under the provisions of the above-mentioned contract and specifications, and also under decision of the Contract Board of Appeals [sic] and the Court of Claims. * * *

Appellant's brief, received November 21, 1960, argues that the claim and the appeal are cognizable under Clause 3, Changes, of the contract.

On December 14, 1960, the Department Counsel filed a statement of the Government's position and brief, coupled with a motion to dismiss

appellant's appeal * * * as involving a claim for unliquidated damages based upon breach of contract, and therefore, beyond the authority of the Board to consider and adjust.

In presenting the claim in question to the contracting officer by its letter of October 30, 1959, appellant summarized the claim by alleging, in paragraph 24 of the statement accompanying that letter, that " * * * the Government failed to fulfill its obligations to us under the contract and its undertaking to the union."

The contract provision referred to by appellant has to do with the Government's share of establishing a community (which became known as the City of Page), near the site of the Glen Canyon Project on the Colorado River in northern Arizona. This provision, as set out in paragraph 33 of the Contract Specifications, is as follows:

Because of the remote location of the dam site from existing communities the Government will establish a town site to provide community facilities for the Government and Contractor's employees.

Appellant had under the contract the obligation of providing a camp for its own employees, as well as certain utilities, streets, sidewalks, a hospital, and kindred facilities, in the same community.

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For several years previously, there had been established in Arizona a "Remote Projects Committee," composed of members from the local unions and from the local chapters of the Associated General Contractors. This committee had agreed at a meeting on December 12, 1956, to a resolution, which was intended to be binding on the eventual successful bidder on the contract for the construction of Glen Canyon Dam, reading as follows:

The Glen Canyon Project shall be remote until thirty (30) days after the contractor has notified the Remote Projects Committee and the committee finds that residential housing facilities are available for those employees who wish to avail themselves of these facilities.

Prior to bidding on the contract, prospective bidders attended a meeting of December 15, 1956, in Phoenix, Arizona, at which the Project Construction Engineer for Glen Canyon Dam described the project and is reported to have stated:

Townsite to be complete with adequate facilities in one to one and one-half years. Government to build town site and buildings for own use: will also provide site and utilities connection for contractors use, contractor to be responsible for own buildings and improvements.¹

It was also announced by the chairman of this meeting, who was not a Government representative, that the successful bidder would be bound by the terms of the current labor agreements with various unions.

Similar statements concerning the date for completion of the community town site are alleged to have been made to union representatives by the Project Construction Engineer on another occasion.

The several union agreements provided for varying rates of subsistence payments, or for free board and room in lieu thereof, for workers employed at remote projects designated as such by the Remote Projects Committee.

In general, the appellant was not obliged to furnish free residential housing under the terms of the Government contract, or even under the union agreements, but under the latter he would be obliged to furnish free board and room, or make subsistence payments to his employees, until sufficient residential housing was made available to take the project out of the remote status. On a short-term job the cost of building residential housing might be prohibitive; but it would be worthwhile, in order to eliminate subsistence payments, on a project which was to take seven years, as Glen Canyon Dam was estimated to require.

Appellant alleges that it figured its bid on the basis of the Government estimate of one to one-and-one-half years for completion of

¹ From summary of reports in "Minutes, Glen Canyon Dam Project—Industry Meeting, December 15, 1956."

the townsite, but that the Government's share of the work was not finished within that time.

When appellant applied to the Remote Project Committee in December 1957, for removal of the remote status, an arbitration proceeding resulted in a determination that the project was still remote as of April 3, 1958. This result, according to appellant's formal claim of October 30, 1959, was caused by the Government's failure to complete the townsite within the one to one-and-one-half years which the project Construction Engineer is reported to have represented as being the time for such completion. Consequently, appellant alleged, "* * * we were forced therefore to continue our work under the handicap of this [remote] status * * * until the 15th of January 1959, when it was finally withdrawn."

The additional compensation claimed is for reimbursement of the costs, alleged to amount to \$767,200.00, incurred by appellant in furnishing free board and room to its employees during the period between April 3, 1958, and January 15, 1959.

After extensions of time for filing a reply brief, appellant requested that the following documents be furnished by the Government as part of the appeal file, as being necessary for preparation of its reply brief:

1. Any and all correspondence and writings from the Secretary of the Interior to the Bureau of Reclamation, authorizing the Bureau of Reclamation to proceed with the Glen Canyon Dam Project.
2. Any and all correspondence and writings from the Bureau of Reclamation instructing private contractors (other than Merritt-Chapman & Scott Corporation), to proceed with the construction of the Government community facilities at the project.
3. Any and all correspondence and writings concerning the authority of the Project Construction Engineer to act on behalf of the Government, in his pre-bidding meetings with union personnel and prospective bidders for the Project.

Department Counsel opposes the furnishing of such additional material on the ground that it is not necessary for the disposition of the motion to dismiss the appeal for lack of jurisdiction, as a claim for breach of contract.

In its brief dated November 17, 1960, appellant urges that the claim is one for an equitable adjustment under Clause 3 "Changes," arising out of a constructive change order in the form of an alleged directive by the Government to the contractor to continue the performance of the contract following the unfavorable decision of the arbitrator on April 3, 1958 (holding that the project was still remote), notwith-

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standing the knowledge of the Government that the contractor would be obliged to provide free board and room to its employees during such continued performance.

Department Counsel in his brief of December 14, 1960, requests that, if the Board should determine that the case cannot be disposed of without further evidence, the Board require counsel for appellant to "make its contentions more specific and certain with regard to the Government directive," by furnishing information as to the identity of the Government official by whom and the official of appellant to whom the directive was given and as to its date, together with copies of any written directive, or if oral, a statement of precisely what allegedly was said by the Government official and relied on by appellant as constituting a directive.

We do not consider it to be necessary to decide the motion by Department Counsel to dismiss the appeal, on the ground that the appellant's claim is for breach of contract and therefore not within the province of the Board to entertain. The claim, as stated in the brief of appellant's counsel, supplementing the Notice of Appeal, is not now presented as a claim merely for failure or delay on the part of the Government to fulfill its obligation under the contract and under the alleged representations of Government officials as to date of completion. On the contrary, it is now presented as a claim that a constructive change order was created by a Government directive to continue the performance of the contract after April 3, 1958, notwithstanding the fact that the appellant in so doing would be subject to additional burdens for costs in excess of its bid estimates, which are alleged to have been based on Government representations as to the date of completion of the townsite. This is a fundamental difference in the theory of the claim.

The claim as now framed is not an appropriate one for determination in this appeal, since it was never presented to the contracting officer for decision. There is nothing in the original claim documents to apprise the contracting officer that the claim was for the making of an equitable adjustment pursuant to an alleged constructive change order. Accordingly, the indispensable ingredients for exercise of the Board's appellate jurisdiction are lacking as to the alleged constructive change order.

It is well settled that the Board has no jurisdiction over a dispute that has not been the subject of a decision by the contracting officer.²

² *M. Benjamin Electric Company*, IBCA-280 (June 9, 1961); *Production Tool Corporation*, IBCA-262 (April 17, 1961), 68 I.D. 109-12; *Barkley Pipeline Construction, Incorporated*, IBCA-264 (April 6, 1961), 68 I.D. 103-04. Cf. *Holly Corporation*, ASBCA No. 3626 (June 30, 1960), 60-2 BCA par. 2685, 2 Govt. Contr. par. 417; *La Voie Laboratories, Incorporated*, ASBCA No. 3796 (January 8, 1959), 59-1 BCA par. 2017, 1 Govt. Contr. par. 175.

It becomes unnecessary also, at this time, to decide the merits of appellant's request for additional documentation of the appeal file, except to observe that it would be patently infeasible, and prohibitive in cost, to assemble into the file in the first instance all of the papers which an appellant might, depending upon the circumstances, ultimately come to believe were relevant to its claim. 43 CFR 4.6 of the Board rules requires the appeal file to contain:

* * * all documents on which the contracting officer *has relied* in making his findings of fact or decision, including the following:

- (a) the findings of fact or decision;
- (b) the contract, specifications, pertinent plans, amendments, and change orders; and
- (c) correspondence and other data material to the appeal. (*Italics supplied.*)

The Board considers that the presentation of the new claim of appellant, involving the alleged directive or constructive change order, is deficient in failing to specify the facts upon which appellant bases its assertions that such a directive or order was issued. Appellant should clothe the bare allegations in its brief of November 17, 1960, with more particularity in accordance with the requests quoted *supra* from Department Counsel's brief.

The contracting officer, following the receipt of such particulars from appellant, should issue a new decision and findings of fact appropriate to appellant's claim as so amended. If an appeal is taken from such decision and findings, the contracting officer should include in the appeal file such additional correspondence and other data as may be material to the new appeal.

CONCLUSION

The appeal is remanded to the contracting officer to await the furnishing by appellant of additional particulars and for the issuance, upon their receipt, of a new decision and findings of fact, consonant with the views as to the proper procedure expressed in the foregoing opinion.

THOMAS M. DURSTON, *Member*.

I concur:

HERBERT J. SLAUGHTER, *Member*.

PAUL H. GANTT, *Chairman*, disqualified himself from participation in the consideration of this appeal. (43 CFR 4.2).

DONALD K. LADD ET AL.

A-28750

*Decided June 26, 1961***Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: Extensions.**

An assignment of a partial interest in an oil and gas lease cannot be approved until all the requirements of section 30(a) of the Mineral Leasing Act, as amended, and the pertinent regulations have been met, and when approved it will take effect as of the first day of the lease month following its proper filing in the proper land office.

Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: Extensions.

A partial assignment of a noncompetitive oil and gas lease which covers land patented by the United States with a reservation of the oil and gas cannot be approved until a bond for the protection of the surface owner is filed.

Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: Extensions.

Since in order for a lease to become segregated through partial assignment and thus become entitled to the extension authorized for segregated leases, a partial assignment affecting it must be filed while there is still one month remaining to the lease term, where the requirements for filing a partial assignment of a noncompetitive oil and gas lease are not met before the end of the next to last month of the lease term, the assignment cannot be approved.

Homesteads (Ordinary): Mineral Reservation—Oil and Gas Leases: Bonds

The provision of the act of July 17, 1914 requiring that a bond be filed with the Secretary for the protection of the owner of surface rights before prospecting can be undertaken requires that such a bond must be filed before a noncompetitive lease can be issued or an assignment approved.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Donald K. Ladd and Fay M. Howd, as lessees, Albert Stevenson, as assignee, and Standard Oil Company of California, as operator, have each appealed to the Secretary of the Interior from a decision dated October 27, 1960, of the Director of the Bureau of Land Management, which affirmed the denial by the Los Angeles land office of approval of a partial assignment of oil and gas lease Los Angeles 076711 on the ground that a required bond had not been filed prior to the expiration of the lease.

The land covered by the lease was patented on December 17, 1920, with a reservation of the oil and gas to the United States under the act of July 17, 1914 (30 U.S.C., 1958 ed., secs. 121-122).

It appears that Howd's interest in the leased land started with the issuance to him of a noncompetitive oil and gas lease, Los Angeles

053016, for a five-year term beginning December 28, 1938. Upon the expiration of the term, he applied for and was granted a preference right lease, Los Angeles 055619, for another five-year term, beginning January 1, 1944, pursuant to section 1 of the act of July 29, 1942 (56 Stat. 726). This lease was issued in the names of Anna M. Ladd and Fay M. Howd. Upon its expiration the present lease was issued to Howd and Donald K. Ladd, as executor of the Estate of Anna M. Ladd, deceased, again as a preference right lease under section 1 of the act of July 29, 1942 (*supra*), for a five-year term beginning December 1, 1949.

Shortly after the second lease was issued on January 1, 1944, the lessees entered into an operating agreement with the Standard Oil Company of California under which the latter as operator was granted full control over the development of the leased premises and assumed, among other matters, the obligation to pay the rentals due under the lease. In accordance with its terms, the operating agreement remained in effect after the preference right lease was issued on December 1, 1949. The lease was thereafter duly extended for a five-year term expiring November 30, 1959, still subject to the operating agreement.

On October 27, 1959, Standard Oil filed with the land office a copy of an instrument of surrender by which it terminated the operating agreement as to 40 of the 160 acres covered in the lease, and surrendered all its right, title and interest in that tract.

On October 28, 1959, Stevenson filed a request for the approval of the assignment to him of the record title to the same 40 acres.

The partial assignment, if proper, would have segregated the lease into two separate leases and would have resulted in the extension of the terms of both for two years from the date the assignment became effective. Section 30(a) of the Mineral Leasing Act, as amended by the act of July 29, 1954 (30 U.S.C., 1958 ed., sec. 187a).¹

On March 24, 1960, the land office denied approval of the assignment and held the lease terminated on the grounds that a bond required for the protection of the surface owner had not been filed by the assignee prior to the expiration of the extended term of the base lease on November 30, 1959, that the assignment could not be approved without the bond, that the base lease had expired by operation of law, and that, as a result, the assignment could not be approved even if a bond were to be filed thereafter.

¹ This provision was further amended by section 6 of the act of September 2, 1960 (30 U.S.C., 1958 ed., Supp. II, sec. 187a) to limit extensions based on partial assignments only to leases in their extended term by production, actual or suspended, or the payment of compensatory royalty.

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On appeal, the Director held that the assignee was required to file a bond, that the assignment could not be approved until a bond was filed, that all the requirements for an assignment had to be satisfied prior to the end of the 11th month of the last year of the lease, that in default thereof the lease expired at the expiration of its term, and that the assignment can not be approved and the lease has terminated.

The appellants contend that there is no requirement in the law, lease or regulations that a bond for the protection of the owner of the surface estate must be filed as a condition precedent to leasing or to the approval of an assignment of a lease.

Before examining the appellants' arguments, it is necessary to review the provisions of the statute, regulations and lease relating to the obligation to file a bond in order to determine the consequences of a failure to file one when required.

Section 30(a) of the Mineral Leasing Act, as amended (*supra*), provides:

* * * any oil or gas lease * * * may be assigned or subleased * * * and any assignment or sublease shall take effect as of the first day of the lease month following the date of filing in the proper land office of three original executed counterparts thereof, together with any required bond and proof of the qualification under this Act of the assignee or sublessee * * *. The Secretary shall disapprove the assignment or sublease only for lack of qualification of the assignee or sublessee or for lack of sufficient bond * * *.

The pertinent regulations on assignments read as follows:

192.40 * * * Subject to final approval by the Bureau of Land Management, assignments or subleases shall take effect as of the first day of the lease month following the date of filing in the proper land office of all the papers required by secs. 192.141 and 192.142. No assignment will be approved if the assignee or sublessee is not qualified to take and hold a lease or if his bond is insufficient * * *. (43 CFR, 1959 Supp., 192.140.)

192.141 Requirements for filing of transfers.

* * * * *
(c) If a bond is necessary, it must be furnished. * * * (43 CFR 192.141(c).)

The general regulation on bonds reads as follows:

192.100 * * * (b) Until a general lease bond is filed a noncompetitive lessee will be required to furnish and maintain a bond in the penal sum of not less than \$1,000 in those cases in which a bond is required by law for the protection of the owners of surface rights. (43 CFR 192.100(b).)

Finally the lease itself reads:

Sec. 2 * * * the lessee hereby agrees:

(a) *Bonds.* (1) To maintain any bond furnished by the lessee as a condition for the issuance of this lease. * * *

Until a general lease bond is filed a noncompetitive lessee will be required to furnish and maintain a bond in the penal sum of not less than \$1,000 in those cases in which a bond is required by law for the protection of the owners of surface rights. * * *

The cited provisions make it plain that if a bond was necessary, the partial assignment could not have been approved until one had been filed. Furthermore, the failure to file the documents required by the statute or regulations prior to the end of the lease term means that the lease expired then by operation of law and the defects could not thereafter be cured.²

The question, then, is whether the assignee was obligated to furnish a bond in connection with his request for the approval of the assignment. This in turn depends on whether a bond is required by law for the protection of the owner's surface rights.

There is nothing in the Mineral Leasing Act itself pertaining to the protection of the owners of land which the United States has patented with a reservation of leasing act minerals.

However, section 2 of the act of July 17, 1914 (*supra*), under which the surface of the land covered by the oil and gas lease was patented provides:

* * * Any person qualified to acquire the reserved deposits may enter upon said lands with a view of prospecting for the same upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting, the measure of any such damage to be fixed by agreement of parties or by a court of competent jurisdiction. Any person who has acquired from the United States the title to or the right to mine and remove the reserved deposits, should the United States dispose of the mineral deposits in lands, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the minerals therefrom, and mine and remove such minerals, upon payment of damages caused thereby to the owner of the land, or upon giving a good and sufficient bond or undertaking therefor in an action instituted in any competent court to ascertain and fix said damages * * *.

The appellants point out that the statute requires a bond to be filed with the Secretary only by a prospector seeking to acquire the right to the reserved minerals and that it does not impose a similar obligation upon one who has acquired the right to mine and remove the reserved deposits. They contend that, as lessees, they come within the second category.

As the appellants indicate, the Mineral Leasing Act as originally enacted provide for the issuance of leases by competitive bidding for land within the known geologic structure of a producing oil or gas field and of prospecting permits for other land with a lease to be issued if a valuable discovery of oil or gas was made within the limits

² Since an assignment becomes effective on the first of the lease month following the date on which the required documents are filed, such documents must be filed prior to the end of the 11th lease month lest the lease expire before the assignment can become effective. *Franco-Western Oil Company et al.*, 65 I.D. 316, 427 (1958).

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of the permit (Act of February 25, 1920, secs. 13, 14, 17; 41 Stat. 441, 443).

The regulations governing the granting of permits to prospect for oil and gas provided that a bond would be required where a permit embraced land entered or patented with a reservation of the oil and gas or other leasing act minerals to the United States.³

On August 21, 1935, the Mineral Leasing Act was amended to abolish prospecting permits as the method of exploring unproven oil lands and to adopt instead leases issued noncompetitively to the first qualified applicant. (49 Stat. 676.)

The regulations issued to conform with the amended act required an applicant for a noncompetitive lease to state that he "is ready * * * to furnish such bond or bonds as may be required under the lease or regulations." Circular 1386, sec. 9 (g); 55 I.D. 502, 507 (1936). They also provided:

until a general lease bond is filed a lessee will be required to furnish and maintain a bond in the penal sum of not less than \$1,000.00 for compliance with the lease obligations, and for the protection of the owner of surface or sub-surface rights or estates from damage resulting from the operations of such lessee, such bond to terminate upon acceptance of the \$5,000 lease bond. *Id.*, sec. 14; p. 517.

Under this regulation the applicants were in all cases required to file a bond prior to the issuance of a lease. When it became apparent that many applicants were experiencing difficulty in furnishing a bond, the regulation was amended to demand one, in cases where there were no surface rights to be protected, only when a lessee failed to pay the rental 90 days prior to the anniversary date of his lease. The amendment was accomplished by adding to section 14 of the regulation (*supra*) the following paragraph:

The requirement made in the preceding paragraph for the filing of a \$1,000 bond shall apply only in those cases in which a bond is required by law for the protection of the owners of surface rights. In all other cases the \$1,000 bond must be filed not less than 90 days before the due date of the next unpaid annual rental, but this requirement may be successively dispensed with by the lessee by making payment of each successive annual rental not less than 90 days prior to its due date. * * * Circular 1464, November 27, 1939; 4 F.R. 4809.

Upon the further extensive amendment of the Mineral Leasing Act by the act of August 8, 1946 (60 Stat. 950), the oil and gas regulations

³ The pertinent regulation read:

"* * * Additional bonds or a bond with additional obligations therein, will be required in special cases where a permit embraces reserved deposits in lands theretofore entered or patented with a reservation of the oil and gas to the United States, together with a right to prospect for, mine, and remove the same pursuant to the act of July 17, 1914 (38 Stat., 509), or where the lands constitute a portion of a reclamation project." Circular 672, sec. 4(h); 47 L.D. 437, 439 (1920).

It is interesting to note that, in addition, the bond required of an oil and gas lessee was for the use and benefit of a surface entryman as well as of the United States. *Id.* 451.

were again revised. They provided that applicants for noncompetitive leases must include in their applications:

A statement that the applicant is ready upon demand * * * to furnish such bond or bonds as may be required under the lease or regulations. 43 CFR 1946 Supp., 192.42(e); Circular 1624; 11 F.R. 12956.

They also provided that:

Until a general lease bond is filed a noncompetitive lessee will be required to furnish and maintain a bond in the penal sum of not less than \$1,000 in those cases in which a bond is required by law for the protection of the owners of surface rights. 43 CFR, 1946 Supp., 192.100.

Upon the adoption of the practice of using the lease form itself as an offer, the requirement that an offeror state that he is ready to furnish a bond was dropped from sec. 192.42 (Circular 1773; 15 F.R. 8583), but the provision dealing with bonds for the protection of surface owners remained unchanged. 43 CFR, 1954 rev., 192.100(b).

This review of the regulations demonstrates that until the revision in 1939 of the regulation governing bonds, a bond was required for the protection of the owner of surface rights by the regulation itself prior to the issuance of a permit or noncompetitive lease. Although Circular 1464 then limited the obligation to file such a bond only to instances in which one was required by law, there is no indication that the revision was interpreted to mean that it relieved a noncompetitive lessee of the obligation to furnish a bond for the protection of the owners of surface rights.

The Department has uniformly held that an offeror for a noncompetitive lease for lands which have been patented with a reservation of the oil and gas deposits to the United States under the act of July 17, 1914, must file a bond for the protection of the owner of the surface rights before a lease will issue. *D. Miller*, A-26768 (November 12, 1953); *D. Miller*, A-28246 (May 23, 1960); See also *D. Miller*, A-27567 (April 29, 1958).⁴

This has been the instruction given to the land offices by the Director of the Bureau of Land Management. The instruction states:

If any of the lands covered by the offer are embraced in an entry * * * or a patent, subject to a reservation of the oil and gas to the United States under the act of July 17, 1914 (38 Stat. 509; 30 U.S.C. sec. 121), * * * the manager will require the applicant to file a \$1,000 bond, form 4-208g. "Bond of Oil and

⁴ The case file of oil and gas lease Los Angeles 055619, on which the lease involved here was based, contains a bond for the protection of the owner of the surface rights which was filed before the lease was issued. It does not appear that another bond was required when the present preference right lease was issued, although in 1952 a statewide bond was filed by the operator.

It also appears that a similar bond was required and filed by Howd in 1938 before the earlier lease, Los Angeles 053016, was issued.

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Gas Lessee" * * *. *The offer should not be executed until the bond is received.* Vol. VI, Bureau of Land Management Manual 2.1.19; emphasis added.

The Department has ruled that an assignment is subject to the same requirement, that if a bond is required an assignment cannot be approved until one is filed. In *Duncan Miller et al.*, 66 I.D. 380 (1959), the Department held that an assignment of an oil and gas lease covering lands patented with a reservation of minerals to the United States was not complete until a bond for the protection of the surface owner was filed and that since the bond was not filed until the twelfth month of the lease (a month after the assignment was filed), the assignment could not be considered to be effective until the first of the next month, which was after the expiration of the 10-year extended term of the lease and too late to form the basis for an extension of the lease term by a subsequent partial assignment by the assignee.

In summation, it is apparent that the Department has ever since the passage of the Mineral Leasing Act in 1920 required an applicant for a prospecting permit to file a bond for the protection of the owners of a surface right before a permit would issue, that the same requirement was imposed on applicants for noncompetitive oil and gas leases, which the act of August 21, 1935 (*supra*), substituted for prospecting permits, and that the requirement has been maintained without change to this date.

The change in the wording of the regulations in 1939 upon which the appellants rely so heavily was adopted only to relieve applicants of an obligation to file a bond before a lease could issue in *all* cases, including cases not involving surface rights. It was not intended to and was not interpreted as modifying in the slightest degree the requirement that an applicant for a noncompetitive oil and gas lease file a bond where surface rights are involved before a lease can issue.

The Department's uniform holding that the act of July 17, 1914, requires a bond for the protection of a surface owner prior to the issuance of a noncompetitive oil and gas lease is based upon both the terms of the statute and the problem it was enacted to solve. It is true that the act speaks in terms of requiring a bond to be filed with the Secretary as a prerequisite for prospecting and not for mining and removing the reserved deposits. However, it must be noted that at the time when the 1914 act was enacted there was no mineral leasing system. A mineral leasing system was not adopted until six years later. It has therefore been necessary to adapt the language of the 1914 act to the subsequent legislation that was enacted. There was no problem when prospecting permits were provided for. When they were abolished in 1935 and noncompetitive leases were provided for,

the Department considered the noncompetitive lease to be a substitute for a prospecting permit in many respects since it is issued only for unproven lands which must be prospected and proven before they can be developed. The reasons which justified a bond for the protection of the surface owner against possibility of damages inherent in prospecting apply as forcibly to noncompetitive leases as to prospecting permits.

The appellant's position, if sound, would leave the surface owner without protection against damages to his crops, improvements, and the value of the land for grazing⁵ inflicted by prospecting. I can see no warrant for holding that the act of July 17, 1914, which was designed to protect the surface owner before and after discovery, sanctions so unfair a result.

Accordingly, it is concluded the Director properly held that a bond is required by the act of July 17, 1914, before a noncompetitive oil and gas lease can issue or an assignment of a lease be approved for lands the surface of which has been patented by the United States with a reservation of the oil and gas deposits.

Since section 30(a), as amended (*supra*), provides for an extension only if a lease is segregated by partial assignment, if the assignment fails, the lease is not segregated and cannot be extended. Thus there is no merit to the appellants' contention that the lease was extended as to the 120 acres retained even if the assignment failed as to the 40 acres assigned.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management is affirmed.

FRANK J. BARRY,
Solicitor.

⁵ Act of June 17, 1949 (30 U.S.C., 1958 ed., sec. 54).

*June 12, 1961***ESTATE OF DAISY WARE BEACH****IA-1160***Decided June 12, 1961***Indian Lands: Descent and Distribution: Claims against Estates**

It is discretionary with the Secretary of the Interior or his authorized representative as to whether to pay from restricted Osage funds a widower's or family allowance ordered by the Oklahoma State courts.

APPEAL FROM THE BUREAU OF INDIAN AFFAIRS

Bernard E. Beach has appealed to the Secretary of the Interior from a decision of the Acting Commissioner of Indian Affairs, dated September 17, 1959, disapproving the payment of a family allowance to him from the estate of Daisy Ware Beach, deceased full blood Osage Allottee No. 719. The appellant is the surviving husband of the decedent.

The case has had a long history of litigation since the decedent's death on May 18, 1949, and involved a determination¹ as to whether the appellant was of Indian blood so that he could inherit his wife's estate, as well as the question of his entitlement to a family allowance. The only question presented in this appeal, however, is whether this Department must pay from restricted Osage funds the family allowance awarded by the Oklahoma State courts or whether it may exercise discretion and decline to pay the allowance from such sources. The amount of the family allowance awarded by the courts is \$11,400.

By the terms of the decedent's will, the appellant was left only \$1.00, as was also an adopted son, with all the remainder of the estate going to a sister, Gladys Ware, a mentally incompetent person. The husband elected to take under the law rather than under the will. A compromise settlement was negotiated with the adopted son with the result that when a final determination was made in the State courts, the appellant and the sister held equal shares in the estate. The family allowance here involved would be paid from restricted funds, half of which belong to the appellant and half of which belong to the sister, who is under guardianship and confined in a State institution. The estate has now been distributed with the exception of the \$11,400 in question.

The appellant contends that since section 3 of the Act of April 18, 1912 (37 Stat. 86), provides that property of deceased Osage Indians "shall, in probate matters be subject to the jurisdiction of the County Courts of the State of Oklahoma," the Secretary of the Interior and his subordinates have no discretion as to disbursement of the funds in an Osage estate and that the Court's orders must be complied with.

¹ *Ware v. Beach* (Okla.), 322 P. 2d 635.

The Commissioner of Indian Affairs took the position that the court's authority to administer property of deceased Osage Indians does not extend to that portion of the property of an Osage decedent which has a restricted status.

That the Secretary of the Interior does have discretionary duties in the administration of Osage estates is indicated by section 2 of the Act of February 27, 1925 (43 Stat. 1008, 1010), which provides that he may disburse restricted funds to the administrators or directly to the heirs or devisees under regulations to be promulgated by him. More important is section 4 of the Act of March 2, 1929 (45 Stat. 1478, 1480), which amends section 2 of the Act of February 27, 1925, *supra*.² It reads, in part:

Upon the death of an Osage Indian of one-half or more Indian blood who does not have a certificate of competency, his or her moneys and funds and other property accrued and accruing to his or her credit and which have heretofore been subject to supervision as provided by law may be paid to the administrator or executor of the estate of such deceased Indian or direct to his heirs or devisees, or may be retained by the Secretary of the Interior in the discretion of the Secretary of the Interior, under regulations to be promulgated by him: *Provided*, That the Secretary of the Interior shall pay to administrators and executors of the estates of such deceased Osage Indians a sufficient amount of money out of such estates to pay all lawful indebtedness and costs and expenses of administration *when approved by him*; and, out of the shares belonging to heirs or devisees, above referred to, he shall pay the costs and expenses of such heirs or devisees, including attorney fees, *when approved by him*, in the determination of heirs or contest of wills. * * * (Second and third *italics* added.)

It is readily apparent from the quoted language of the statute that the Secretary of the Interior has discretion in the matter of the payment of costs and expenses of administration incurred by the estates of deceased Osage Indians of one-half or more Indian blood who do not have a certificate of competency. Daisy Ware Beach was in this category. Where Congress did not intend the Secretary to have discretion, its language was equally plain. The following quotation again is from the 1929 Act, being the language of that act immediately after the end of the preceding quotation.

* * * Upon the death of any Osage Indian of less than one-half of Osage Indian blood or upon the death of an Osage Indian who has a certificate of competency, his moneys and funds and other property accrued and accruing to his credit shall be paid and delivered to the administrator or executor of his estate to be administered upon according to the laws of the State of Oklahoma.

² See *Estate of Howard M. West*, A-25649, decided April 8, 1949, by the Assistant Secretary of the Interior, ruling that a claim approved by the County court against the estate of a deceased Osage Indian was properly refused payment from the restricted funds of the estate by the Assistant to the Commissioner of Indian Affairs.

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In support of appellant's contention that the payment of the allowance is not a matter of discretion, his brief cites *Work v. Lynn*, 266 U.S. 161; *United States ex rel Kennedy v. Tyler*, 269 U.S. 13; *Chesnut v. Capey*, 45 Okl. 754, 146 Pac. 589; and *United States ex rel Bartlett v. Wilcox*, 75 Okl. 158, 182 Pac. 673. Of these cases only *Work v. Lynn* involved Osage Indians or Osage statutes, and in the *Lynn* case the issue decided was quite different from the one here. That case held that a guardian of an adult Osage Indian was entitled to receive from this Department free of any conditions the payment prescribed by section 4 of the Act of March 3, 1921 (41 Stat. 1249), for an adult Osage Indian who had not received a certificate of competency.

The 1929 Act is the basis of 25 CFR 108.28 (e) and (f), upon which the Acting Commissioner relied. These regulations provide that an allowance may be made to the *widow* and minor children in a limited amount and for a period of one year, but only where there is actual need for such allowance. The Commissioner concluded that the appellant was never in need of the allowance ordered by the Court. The record discloses that the appellant was gainfully employed by the Douglas Aircraft Company, both before and after decedent's death, earning in excess of \$250 per month. There was no child or children to whom he contributed support. To pay the allowance now would be to deplete the share of Gladys Ware to the extent of \$5,700 after distribution of most of the estate has been made, and the period for which the allowance is designed has therefore past.

The payment of such an allowance from restricted funds being wholly discretionary under the governing regulations of this Department, and since in the circumstances it appears reasonable to have found the widower's or family allowance was not necessary and no hardship existed when it was presented to the superintendent of the Osage Agency, the Acting Commissioner of Indian Affairs was correct in sustaining the ruling of the Superintendent and the Area Director, which properly applied the regulations with respect to this case.

Accordingly, the decision of the Acting Commissioner declining to pay a family allowance to the appellant is affirmed and the appeal is dismissed.

JOHN A. CARVER, JR.,
Assistant Secretary.

ANN GUYER LEWIS ET AL.

A-28540

*Decided July 3, 1961***Oil and Gas Leases: Extensions—Oil and Gas Leases: Production—Oil and Gas Leases: Unit and Cooperative Agreements**

Where the non-producing and producing portions of a leasehold are separated into segregated leases upon unitization of only the non-producing lands at a time when the parent lease is in its extended term because of production, the term of the segregated, unitized, non-producing lease does not expire as long as production continues on the non-unitized portion of the lease.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Ann Guyer Lewis has appealed to the Secretary of the Interior from a decision of May 5, 1960, by the Director of the Bureau of Land Management which reversed a decision by the Denver land office holding that oil and gas lease Denver 053302 terminated by operation of law on June 29, 1959. Mountain Fuel Supply Company, the appellant in the proceeding before the Director and lessee under Denver 053302, submitted a brief in this proceeding in support of the Director's decision. Mrs. Lewis filed an application, Colorado 030587, on September 1, 1959, for the lands covered by Denver 053302.

Lease Denver 053302, issued November 1, 1946, was extended under section 17 of the Mineral Leasing Act, as amended, for a period of 5 years ending October 31, 1956 (30 U.S.C., 1958 ed., sec. 226). On March 11, 1956, a producing well was completed and the lease was continued by production beyond its statutory term of years. By land office decision of July 8, 1959, the lands in Denver 053302 were segregated into two separate leases, a portion of the lands having been committed to the Shell Creek Unit Agreement, approved effective June 30, 1959 (30 U.S.C., 1958 ed., sec. 226e; 43 CFR, 1959 Supp. 192.122(c)). The lands which were committed to the unit retained serial number Denver 053302 and the segregated non-unitized lands were given serial number Colorado 029285. It is land in non-unitized Colorado 029285 which contains the producing well that extended the term of the base lease before unit commitment and segregation. There was and has been no production from any other lands covered by the base lease. A land office decision of August 27, 1959, amended the decision of July 8 by holding that segregated lease Colorado 029285 is in a producing status and Denver 053302 is considered to have terminated by operation of law on June 29, 1959, because the producing well which extended the lease prior to the effective date of the unit agreement is on nonunitized segregated lease Colorado 029285. Thus, the land office decision held that the effect of committing the nonproducing portion of a producing lease to a unit agreement at a

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time when the base lease is in an extended term because of production is to terminate the non-producing portion of the lease by operation of law.

Section 17(b) of the Mineral Leasing Act, as amended by the act of July 29, 1954 (30 U.S.C., 1958 ed., sec. 226(e)), provides in applicable part:

Any other lease issued under any section of this Act which has heretofore or may hereafter be committed to any such [unit] plan that contains a general provision for allocation of oil or gas, shall continue in force and effect as to the land committed, so long as the lease remains subject to the plan: *Provided*, That production is had in paying quantities under the plan prior to the expiration date of the term of such lease. Any lease hereafter committed to any such plan embracing lands that are in part within and in part outside of the area covered by any such plan shall be segregated into separate leases as to the lands committed and the lands not committed as of the effective date of unitization: *Provided, however*, That any such lease as to the nonunitized portion shall continue in force and effect for the term thereof but for not less than two years from the date of such segregation and so long thereafter as oil or gas is produced in paying quantities.

There is nothing in the statute which specifically provides for the situation presented here.

The Director reversed the land office decision of August 27, 1959, on the ground that in an opinion (M-36592) of January 21, 1960, the Associate Solicitor for Public Lands held that when the non-producing portion of a producing oil and gas lease, which is then in its extended term by reason of production, is committed to an approved unit plan under which production has not yet been obtained, the segregated unitized portion will continue in effect for the life of production on the non-unitized portion, and thereafter for the life of the unit, if production under the unit plan is obtained before production ceases on the segregated non-unitized portion. In the instant case, the Director held, consistently with the Associate Solicitor's opinion, that unitized lease Denver 053302 did not expire by reason of segregation from the producing portion of the parent lease, but that the unitized lease continues in force and effect during the continuance of production on the non-unitized portion.

The Associate Solicitor's opinion of January 21, 1960, upon which the Director's decision is based points out that upon commitment of a non-producing portion of a lease which is then in its extended term by reason of production, the 'term' of the committed portion includes the entire, though indefinite, period the parent lease has to run as of the date of its segregation (citing Solicitor's opinion, M-36349, 63 I.D. 246 (1956)). That is, at the time of separation into two leases as a result of unitization, the parent lease had neither a fixed number of

years nor a definite period of time to run; its term was to continue as long as oil or gas was produced in paying quantities. The Director held, in effect, that after segregation by unitization, the non-producing unitized portion of the lease kept the term of the parent lease. Thus, even if there has been no production under the unit at the time of unitization of a non-producing portion of a lease which at the time of unitization is in its extended term by reason of production, the segregated unitized lease continues in effect for the life of production on the nonunitized portion, which is the term of the parent lease. The division of the leased lands at the time of unitization does not change the term of the parent lease, and it is that term which determines the expiration date of the unitized lease (see M-36349, *supra*).

None of the matters mentioned on appeal provides a basis for modifying the Director's decision. The Director's interpretation, in the circumstances of this case, of the effect of unitization of the non-producing portion of a lease which is in its extended term by reason of production is harmonious with the legislative history of the provision.¹ Moreover, to interpret the relevant statutory provision as resulting in the termination of a non-producing segregated portion of a lease upon unitization if the parent lease is in an extended term by reason of production, as is urged on behalf of the appellant, would make the provisions relating to the unitization of such lands quite pointless. The statute will not be so interpreted if this is unnecessary.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management is affirmed.

EDWARD W. FISHER,
Deputy Solicitor.

¹ See Solicitor's opinion, M-36349, *supra*, p. 247. In both the House and Senate reports on S. 2880, the bill which became the act of July 29, 1954, amending the Mineral Leasing Act, comments on the above-quoted provision which is involved in this appeal quote this Department's explanation of the meaning of the word 'term' in the provision (H. Rep. No. 2238, 83rd Cong., 2d Sess., p. 4; S. Rep. No. 1609, 83rd Cong., 2d Sess., p. 3; cf. Hearing Before the Subcommittee on Public Lands of the Senate Committee on Interior and Insular Affairs, 83rd Cong., 2d Sess., p. 40 (1954)).

July 6, 1961

UNITED STATES v. M. V. BROWNING, ADMINISTRATOR OF THE
ESTATE OF O. W. BROWNING, DECEASED

A-28611

Decided July 6, 1961

Rules of Practice: Supervisory Authority of Secretary

The Secretary of the Interior may in the exercise of his supervisory authority assume jurisdiction over a case pending on appeal before the Director of the Bureau of Land Management without awaiting a decision by the Director and subsequent appeal from that decision.

Rules of Practice: Government Contests—Mining Claims: Contests

Where an administrator of the estate of a deceased locator of mining claims answered each and every allegation in complaints filed by the Government against the validity of the claims and where, because of lack of knowledge, the administrator neither admitted nor denied the material allegations thereof the answers will be deemed to be denials of the allegations and hearings will be held to determine the validity of the claims.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

M. V. Browning, Administrator of the estate of O. W. Browning, deceased, has appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated June 30, 1960, which affirmed separate decisions of the manager of the Sacramento, California, land office, dated October 12, 1959, holding the Canady Hill No. 1 mining claim (Contest No. 10-18) and the Sun Set Nos. 1, 2, 3, and 4 mining claims (Contest No. 10-26) to be null and void. Browning has also appealed to the Director of the Bureau of Land Management from another decision of the manager, dated May 19, 1960, holding the Prince Albert, the Georgeana, and Nemo mining claims (Contest No. 10-227) to be null and void. While the Director has not rendered any decision on the appeal from the manager's decision on the latter three claims, the same issue is involved in that decision as is involved in the decision of the Director from which Browning has taken his appeal to the Secretary. In the exercise of his supervisory authority, the Secretary may take up this appeal without waiting for a ruling by the Director. *United States v. Thomas R. Shuck et al*, A-27965 (February 2, 1960); *State of Louisiana et al*, A-27345 (March 4, 1957); *Theora A. Gerry*, A-26319 (October 3, 1951); *George C. Vournas*, 56 I.D. 390 (1938). Accordingly Browning's appeal from the manager's decision of May 19, 1960, will be considered along with his appeal to the Secretary from the Director's decision.

Each of the claims here under consideration was declared to be null and void on the basis of the answers filed by the Administrator

in response to contest proceedings against the claims initiated by the Government. Complaints were served on M. V. Browning, as Administrator of the Estate of O. W. Browning, deceased, alleging, among other things, in paragraph V of each complaint that the lands on which the claims are located are nonmineral in character and that minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery under the mining laws (30 U.S.C., 1958 ed., sec. 21 *et seq.*).

The complaints, filed in accordance with 43 CFR Part 221 in the Sacramento land office of the Bureau of Land Management, requested that the United States, acting through the State Supervisor, Bureau of Land Management, by whom the complaints were signed, be allowed to prove the allegations thereof. The complaints contained notice that unless the contestee, M. V. Browning (the Administrator), filed answers to the complaints within 30 days the allegations of the complaints would be taken as admitted.

Browning answered every allegation in each complaint. He disclaimed any knowledge with respect to the specific charges brought against the claims, and with respect to those charges, his answers are identical. In response to the allegations in paragraph V of each complaint, setting forth the charges above stated, he responded:

Having no knowledge of the allegations in paragraph 5 of the complaint, contestee neither admits nor denies but demands proof thereof.¹

Each of his answers concluded with the following statement:

Wherefore, contestee requests that this answer be filed and issue joined on the complaint, and that a certified copy of this answer be served on the contestant.

The Director held that the answers failed in "specifically meeting and responding to the allegations of the complaint" as required by the Department's rules of practice (43 CFR, 1959 Supp., 221.64, made applicable to answers filed in contests initiated by the Government by 43 CFR, 1959 Supp., 221.68). He held, further, that the answers could not be considered as general denials of the allegations of the complaints because they were not based on knowledge but on belief and that since the answers did not deny the charges they must be taken as admitted. He pointed out that one in the position of the contestee who had no actual knowledge relating to the claims might have applied for and received an extension of time within which to obtain the necessary information upon which to answer the complaints but that, having failed to do this, the contestee was bound by his answers.

Browning contends that the Director's holding that the answers filed did not specifically meet and respond to the allegations of the

¹ In two answers the appellant apparently inadvertently referred to paragraph 3, instead of paragraph 5, of the complaint.

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complaints is erroneous because "each and every material allegation in the complaint was either denied, admitted, qualified, or explained, with the sole intention of joining issue * * * " and that he was misled by the arbitrary action of the manager in declaring the claims to be null and void after he had been assured that hearings would be held on the claims.²

In the circumstances of this case, I believe that the answers filed by the Administrator are sufficient to put the validity of the claims in issue.

An answer couched in the terms of the contestee's answers would, under Rule 8(b) of the Federal Rules of Civil Procedure (28 U.S.C., 1958 ed., p. 5135) be deemed to be a denial. That rule, after stating that the party shall state his defenses in short and plain terms, continues:

If he is without knowledge or information sufficient to form a belief as to the truth of an averment, he shall so state and this has the effect of a denial.

The courts have held that answers that set forth that defendant has not sufficient knowledge or information to form a belief, in legal effect, constitute denials (*McHenry v. Ford Motor Company*, 269 F. 2d 18 (6th Cir. 1959); *United States v. Koch Bros. Bag Co.*, 109 F. Supp. 540 (D.C. Mo. 1953)), even though the answers may not contain the precise language of the rule (*Barthel v. Stamm*, 145 F. 2d 487 (5th Cir. 1944); cert. denied 324 U.S. 878); that denials on the ground that the party is without any knowledge constitute compliance with the rule, since the rule should be reasonably and not technically construed (*Caterpillar Tractor Co. v. International Harvester Co.*, 106 F. 2d 769 (9th Cir. 1939); and that answers which neither admit nor deny allegations but require the plaintiff to make proof thereof are sufficient to put the allegations in issue (*Grant v. Leach & Company, Inc.*, 280 U.S. 351, 357 (1930)).

The courts will not, however, accept such an answer as a denial where the fact as to which want of knowledge is asserted is, to the knowledge of the court, so plainly and necessarily within the defendant's knowledge that his averment of ignorance must be palpably untrue (*Ice Plant Equipment Co. v. Martocello*, 43 F. Supp. 281 (D.C. Pa. 1941), or mere pretense or evasion (*Barthel v. Stamm, supra*).

While contests initiated by the Government against mining claims are not bound by or conducted under the Federal Rules of Civil

² The records show that the State Supervisor, in 1957, shortly after the answers were filed, wrote to the Administrator's attorney and to a member of Congress stating that hearings would be held to determine the validity of the claims. The manager's decisions were rendered some two years thereafter.

Procedure, it would appear that in a situation such as here presented, where the complaint was served on an administrator of a deceased locator's estate, at least the spirit of those rules, as interpreted by the courts, should be followed in interpreting the Department's rules and that the Department's requirement that an answer must specifically meet and respond to the allegations of a complaint is satisfied where an administrator responds to a complaint and answers each and every allegation therein, even though he may state that he has no knowledge as to the truth of the material allegations therein. This is particularly true where the administrator, as in this case, requests that issue be joined.

This is not to say, of course, that a similar answer filed by one who is himself a locator or the purchaser of a mining claim would be regarded in the same light. In such a situation, the contestee would be presumed to have the requisite knowledge to admit or deny the various allegations of the complaint.

Accordingly, it must be held that it was improper to declare the claims here in question null and void on the basis of the answers filed by M. V. Browning, Administrator of the estate of O. W. Browning, deceased.

The contests against these claims should, therefore, be referred to an examiner, who should proceed to hold hearings thereon in accordance with the applicable departmental regulations (43 CFR, 1959 Supp., 221.69 *et seq.*).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director on the Canady Hill No. 1 mining claim and on the Sun Set Nos. 1, 2, 3, and 4 mining claims and the decision of the manager on the Prince Albert, the Georgeana, and the Nemo mining claims are reversed and the cases are remanded to the Bureau of Land Management for appropriate action consistent with this decision.

EDWARD W. FISHER,
Deputy Solicitor.

CONTINENTAL OIL COMPANY

A-27973

Decided July 7, 1961

Rights-of-Way: Act of February 25, 1920

Section 28 of the Mineral Leasing Act, as amended, is the only statutory authority for the granting of rights-of-way across public lands for pipeline purposes for the transportation of oil or natural gas and such rights-of-way may be granted only upon the conditions set forth therein.

July 7, 1961

Rights-of-Way: Act of February 25, 1920

Section 29 of the Mineral Leasing Act does not confer upon the Secretary of the Interior any authority to grant rights-of-way for pipe-line purposes for the transportation of oil or natural gas across the public lands.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Continental Oil Company has appealed to the Secretary of the Interior from a decision of the Director, Bureau of Land Management, dated December 5, 1958, which affirmed the action of the manager of the land office at Cheyenne, Wyoming, in calling upon the company to execute common-carrier stipulations (43 CFR 244.62) pursuant to section 28 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 185), prior to the allowance of three applications for pipe-line rights-of-way across public lands in Wyoming.

The requests for the rights-of-way were sought by the company by applications filed on August 13, 1957, under section 29 of the Mineral Leasing Act (30 U.S.C., 1958 ed., sec. 186) and the provisions of 43 CFR 244.67 (a) and (c). The proposed rights-of-way are for lines to connect with an existing casinghead gas gathering line (Wyoming 054644), for a residue gas fuel line (Wyoming 054645), and for a gas collecting system (Wyoming 054646).¹ The company states that all of the public lands which the lines would cross are under lease to it under the Mineral Leasing Act (30 U.S.C., 1958 ed., sec. 181 *et seq.*), that the pipe-line rights-of-way applied for are necessary for the efficient operation of its producing wells located in the vicinity of its gasoline plant, that the lines constitute a part of its gathering system which carries casinghead gas from its separators to its gasoline plant for removal of petroleum liquids, that the residue gas from the plant is used, in part, for power in appellant's production operations and the remainder is returned underground for pressure maintenance and for storage, and that it would be economically unsound to build a separate gasoline plant on each of the producing leases operated by the company. It contends that the Secretary has authority to grant the rights-of-way under section 29 of the Mineral Leasing Act and that prior decisions of the Department, holding that the Secretary of the Interior has no authority to grant rights-of-way for pipe-line purposes for the transportation of oil or gas over the public domain except in accordance with the provisions, limitations, and conditions embodied in section 28 of the Mineral Leasing Act (*Frances R. Reay, Lessee, Standard Oil Company of*

¹ According to statements made in the applications the residue gas fuel line covered by Wyoming 054645 has been constructed and has been in operation since 1951 and the gas collecting system covered by Wyoming 054646 has been constructed and was placed in operation in November 1953.

California, Operator, 60 I.D. 366 (1949)) and that the Secretary has no discretion to excuse any applicant from the statutory common-carrier requirement of section 28 of the act in respect to any proposed line of pipe carrying natural gas across public lands (*Continental Oil Company*, 61 I.D. 403 (1954)), did not consider the authority conferred by section 29 of the act. The appellant contends that the Department's holdings give no effect to section 29.

Section 28, as originally enacted (41 Stat. 437, 449), provided:

That rights of way through the public lands, including the forest reserves, of the United States are hereby granted for pipe-line purposes for the transportation of oil or natural gas * * * upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers: * * * *Provided further*, That no right of way shall hereafter be granted over said lands for the transportation of oil or natural gas except under and subject to the provisions, limitations, and conditions of this section. * * *

Thus the section itself granted the rights-of-way subject to the limitations and conditions set forth.

Section 29 of the act, as originally enacted and since unchanged, in so far as here pertinent, provides that any lease issued under the act shall reserve to the Secretary of the Interior the right to permit, "upon such terms as he may determine to be just" such easements or rights-of-way in the leased lands as may be necessary or proper to the working of such leased lands, or of other lands containing the deposits enumerated in the act, and the treatment and shipment of the products thereof by or under authority of the Government or its lessees, and for other public purposes. The section authorizes the Secretary, during the life of any lease, to issue such permits for the easements therein provided to be reserved. Obviously, the Congress was not dealing in section 29 with rights-of-way for pipe lines for the transportation of oil or natural gas, having granted such rights-of-way by section 28. Nor is it appropriate to assume that the Congress, after having provided that rights-of-way for the transportation of oil or natural gas across the public lands of the United States should be subject to the conditions imposed by the Congress, would, in the next section, confer upon the Secretary the authority to grant such rights-of-way upon his own terms.

Section 28 was materially amended by the act of August 21, 1935 (49 Stat. 676, 678). Among other changes, the words "are hereby granted for pipeline purposes for the transportation of oil or natural gas" were amended to read "may be granted by the Secretary of the Interior for pipe-line purposes for the transportation of oil or natural gas" and the following language added after the condition that such pipe lines must be constructed, operated and maintained as common carriers.

July 7, 1961

and shall accept, convey, transport, or purchase without discrimination, oil or natural gas produced from Government lands in the vicinity of the pipe line in such proportionate amounts as the Secretary of the Interior may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine to be reasonable.

The section, as amended, retains the significant proviso that no right-of-way shall thereafter be granted over such lands for the transportation of oil or natural gas except under and subject to the provisions, limitations, and conditions of that section.

The Department has, since the 1935 amendment, construed section 28 of the act to be the only statutory provision authorizing the granting of rights-of-way for pipe lines for the transportation of oil or natural gas across the public lands (*Utah Oil Refining Company*, 57 I.D. 79 (1939)), and, while the departmental decisions referred to by the appellant do not specifically mention section 29, it is obvious that in view of the express language in section 28, section 29 does not authorize the granting of rights-of-way for the transportation of oil or natural gas.

Furthermore, the regulations of the Department for the filing of applications for rights-of-way over lands subject to mineral lease (43 CFR 244.67) require that where a statutory provision, other than section 29 of the Mineral Leasing Act, covers the type of right-of-way desired, applications shall be made in accordance with such other statutory provision and the applicable regulations (43 CFR 244.67(b)). And 43 CFR 244.67(c), pursuant to which these applications were purported to be filed, is applicable only "[w]here there is no other statutory provision covering the type of right-of-way desired." As there is other statutory provision for the granting of the rights-of-way sought by the appellant and as that statutory provision (section 28) requires that all such rights-of-way shall be granted only under the conditions set forth therein, it is obvious that 43 CFR 244.67(c) has no application to the rights-of-way sought by the appellant.

Nor do the circumstances present in this case that the lines here under discussion cross only public lands under lease to the appellant and that the appellant contemplates their use only in production operations alter our conclusion. Section 28 speaks of rights-of-way for pipe-line purposes for the transportation of oil or natural gas. It makes no distinction between lines which cross only lands under lease to the pipe-line applicant and lines which may cross lands under lease to others or lines which may cross lands on which there may be no leases nor does it require that the lines be constructed, operated

and maintained as common carriers only in the event the lines are to carry oil or natural gas to market.

Accordingly, it must be held that it was proper to reject the applications of Continental Oil Company filed under section 29 of the Mineral Leasing Act and to require, as a condition precedent to the granting of the requested rights-of-way, that the company agree to become a common carrier and to be bound by the terms of section 28 of the Mineral Leasing Act and the appropriate regulations of the Department.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director, Bureau of Land Management, is affirmed.

EDWARD W. FISHER,
Deputy Solicitor.

LYMAN B. CRUNK, WILLIAM A. KOBY

A-28738 *Decided July 12, 1961*

**Mining Claims: Lands Subject to—Mining Claims: Withdrawn Land—
Indian Lands: Generally**

Lands first temporarily withdrawn from all forms of entry and disposal under the public land laws in aid of legislation for restoration to tribal ownership and later again temporarily withdrawn from any kind of disposal pending determination of whether they should be restored to tribal ownership are not thereafter subject to mineral location.

Mining Claims: Lands Subject to—Trespass: Generally

Persons locating and maintaining mining claims on lands withdrawn from mineral entry are trespassing upon the public lands.

**Mining Claims: Lands Subject to—Mining Claims: Withdrawn Lands—
Mining Claims: Relocation**

Mining claims on lands subsequently withdrawn from mineral entry subject to valid existing rights initiated prior to the withdrawal are not subject to relocation after the effective date of the withdrawal for failure of the original locators to do assessment work.

**Secretary of the Interior—Withdrawals and Reservations: Authority to
Make—Withdrawals and Reservations: Temporary Withdrawals**

The Secretary of the Interior has authority to make a temporary withdrawal of ceded Indian lands from all forms of disposition under the public land laws, including the mining laws, apart from the statutory authority vested in him by the act of June 25, 1910, as amended.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Lyman B. Crunk and William A. Koby have appealed to the Secretary of the Interior from a decision dated November 22, 1960, of

July 12, 1961

the Director of the Bureau of Land Management which affirmed the state supervisor's dismissal of their answer to a notice of trespass he had served upon them.

It appears that on July 3, 1955, and October 26, 1955, the appellants or their predecessors located two lode mining claims, the La Vina and La Vina #2, upon land in the E $\frac{1}{2}$ sec. 35, T. 4 S., R. 19 E., G & SRM, Arizona.

This land along with the other land had been "temporarily withdrawn from all forms of entry or disposal under the public land laws * * * subject to all valid rights and claims initiated prior to the approval hereof" on March 30, 1931, in aid of legislation to restore it and other lands, which had once been a part of the San Carlos reservation,¹ to the ownership of the Indians of that reservation. This withdrawal has not been revoked.

A few years later, on September 19, 1934, the same lands, along with surplus lands on many other Indian reservations, were "temporarily withdrawn from disposal of any kind, subject to any and all valid existing rights, until the matter of their permanent restoration to tribal ownership, as authorized by section 3 of the Act of June 18, 1934, *supra* [25 U.S.C., 1958 ed., sec. 463], can be given appropriate consideration." 54 I.D. 559, 563.

The lands were thereafter administered by the Bureau of Land Management and grazing permits under the Taylor Grazing Act (43 U.S.C., 1958 ed., sec. 315 *et seq.*) have been issued covering them. It was the grazing permittee who called the attention of the land office to the mining locations and who alleges that the existence of the claims is seriously interfering with his use of the land for grazing purposes.

The trespass notice, dated May 11, 1960, stated that the appellants were in trespass in that they were in "unauthorized occupancy of lands under administration of United States Bureau of Land Management" and that the law violated was: "Withdrawal of March 30, 1931, under general withdrawal authority of President; Act of June 25, 1910; Act of March 3, 1927 (25 U.S.C. 1958 ed., Sec. 398d); Act of June 28, 1934 (48 Stat. 1269) as amended."

In their answers to the notice, the appellants alleged that their claims were relocations of claims located in 1927 which were subject to relocation for failure to do assessment work (30 U.S.C., 1958 ed.,

¹ Executive Orders of November 9, 1871, and December 14, 1872, created the reservation. An agreement of February 25, 1896, ratified by the act of June 10, 1896 (29 Stat. 358), ceded 232,000 acres to the United States. The agreement provided that the proceeds from disposals of the ceded lands were to be deposited in the United States Treasury for the credit and benefit of the Indians and the ratifying act stated that the lands were to be opened to occupation, location, and purchase only under the mineral land laws.

sec. 28) and that the fact that the lands were within mining claims on the date of the March 30, 1931, withdrawal excluded them from the withdrawal.

The state supervisor, in his decision of August 9, 1960, dismissed the answers, pointing out that the withdrawal did not exclude lands in outstanding valid mining claims, but merely provided that it was subject to valid mining claims initiated prior to it and that the appellants' claims, having been made after the date of the withdrawal, could not benefit from the savings clause. He concluded that the La Vina and La Vina #2 claims were null and void *ab initio* and could not afford a legal justification for the occupancy of the land.

On appeal to the Director, the appellants contended that temporary withdrawals made by the Secretary are controlled by the act of June 25, 1910, as amended (43 U.S.C., 1958 ed., sec. 141 *et seq.*), that that act provides that temporary withdrawals shall be open to mineral location for metalliferous minerals, and that an opinion of the Attorney General (40 Op.A.G. 73 (1941)) had held that a temporary withdrawal for a purpose coming within the 1910 act left the lands it covered subject to mining location for metalliferous minerals.

The Director held that the power to withdraw lands temporarily or permanently in aid of legislation is inherent in the President (or his delegate) and that temporary withdrawals made under this inherent authority are not subject to the restrictions of the 1910 act. He concluded that the withdrawal properly removed the land from the operation of the mining laws, that the land was not open to mineral location when the appellants initiated their claims, and that their claims are null and void.

In their appeal to the Secretary the appellants repeat the contentions they urged upon the Director and seek to distinguish the cases cited in support of his conclusion.

The Department has in the past considered similar arguments and has concluded that the Secretary has implied authority aside from the act of 1910, as amended, to withdraw temporarily lands such as those involved in this appeal from all types of disposition under the public land laws, including the mining laws. In an extensive discussion of the problem the Solicitor stated:

It has been requested that I express an opinion on the following question:

"Are the undisposed-of surplus lands in the S $\frac{1}{2}$ of the Colville Reservation, Washington, which lands have been temporarily withdrawn from disposal of any kind by Departmental Order of September 19, 1934 (54 I.D. 559), as supplemented by an order dated November 5, 1935, open to entry and location of mining claims under the mining laws of the United States so far as the same apply to metalliferous minerals?"

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By the departmental order of September 19, 1934, the surplus lands of the Colville Indian Reservation, together with lands of other Indian reservations in the same category, were temporarily withdrawn from disposal of any kind, subject to any and all existing valid rights, until the matter of their permanent restoration to tribal ownership, as authorized by section 3 of the Act of June 18, 1934 * * * can be given appropriate consideration.¹

I believe that, apart from authority derived by the Secretary of the Interior from the President for the making of temporary withdrawals of public lands of the United States under the 1910 act, the Secretary was vested with implied power, by virtue of his broad authority and responsibility in connection with the administration of Indian affairs, temporarily to withdraw the Indian trust lands involved in the order of September 19, 1934, from disposal of any kind if he regarded such action as necessary or advisable in order effectively to discharge his functions with respect to the administration of Indian affairs. The Secretary's implied power to make temporary withdrawals of lands in connection with the administration of Indian affairs was recognized and confirmed by the Congress in section 4 of the act of March 3, 1927 (44 Stat. 1347; 25 U.S.C., 1946 ed., sec. 398d), which, in prohibiting the executive branch of the Government from subsequently making "changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians," declared in a proviso "That this shall not apply to temporary withdrawals by the Secretary of the Interior."

* * * * *

Therefore, I conclude that, in temporarily withdrawing, on September 19, 1934, the surplus lands of the Colville Indian Reservation and of other Indian reservations, which are Indian trust lands, from disposal of any kind, the Secretary of the Interior was exercising his implied power temporarily to withdraw such lands; that he was not acting under the act of June 25, 1910; and, therefore, that the lands so withdrawn have not been and are not now subject to the provision of the 1910 act, which declares that lands withdrawn under it shall be open to entry and location under the mining laws of the United States insofar as metalliferous minerals are concerned. Solicitor's opinion of May 24, 1949, 60 I.D. 318.

On the basis of this opinion, it has been held that the withdrawal of September 19, 1934, was valid to close the land it covered to mineral location. *Consolidated Mines and Smelting Co., Ltd.*, A-27019 (July 28, 1954); see also *P. & G. Mining Company*, 67 I.D. 217 (1960); *Denver R. Williams*, 67 I.D. 315 (1960); *Betty Ruth Wright et al.*, A-27519 (November 14, 1958); Solicitor's opinion, 60 I.D. 54 (1947).

The appellants seek to distinguish the Solicitor's opinion of May 24, 1949 (*supra*), on the ground that it "applies to withdrawal of Indian trust lands and not as in the instant case lands of the open public domain which have been temporarily withdrawn." The lands covered by the appellants' mineral locations, like the surplus lands of the Colville reservation discussed in that opinion, were formerly part of

¹ The act of June 18, 1934 (48 Stat. 984; 25 U.S.C., 1946 ed., sec. 461 *et seq.*), is commonly known as the Indian Reorganization Act.

an Indian reservation and were removed from it to permit entry under one or more of the public land laws with the proceeds resulting from the disposition of the lands to be credited to the Indians (agreement of February 25, 1896, ratified by act of June 10, 1896, *supra*, fn. 1). It is lands of this class which are deemed to be surplus lands of Indian reservations eligible for restoration to tribal ownership under section 3 of the act of June 18, 1934, *supra* (54 I.D. 559, 560 (1934); Solicitor's opinion, 56 I.D. 330 (1938)), and which were the object of the withdrawal order of September 19, 1934, *supra*. Solicitor's opinion of May 24, 1949, *supra*. Accordingly, there is no basis for distinguishing these lands from those considered in the opinion of May 24, 1949. In fact, as noted earlier, the lands considered here were not only withdrawn on March 30, 1931, but were also included in the later withdrawal of September 19, 1934, which was the subject of the opinion of May 24, 1949.

Hence the Director properly held that the lands in question were withdrawn from mineral location prior to the dates on which the appellants' locations were made.

The fact that there were older claims on the land cannot help the appellants. Although the withdrawals were made subject to existing valid claims, and did not affect these claims, it prevented any subsequent claims from being located, whether the older claims were properly maintained or not. *James M. Wells et al.*, A-28549 (February 10, 1961). Thus, it is unnecessary to consider, as the Director did, whether the relocation of the claims by the appellants wiped out the older claims and placed the lands they covered into the withdrawals.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director is affirmed.

EDWARD W. FISHER,
Deputy Solicitor.

TEXACO, INC.

A-28449

Decided July 14, 1961

Oil and Gas Leases: Suspension of Operations and Production

An order prohibiting drilling on oil and gas leases in the interest of preventing waste of potash ore is in the interest of conservation, and, in accordance with departmental regulation 43 CFR 191.26, the terms of the leases and the rental payments thereunder may be suspended under section 39 during the life of such an order even if there is no well capable of producing on the leasehold.

July 14, 1961

Oil and Gas Leases: Drilling—Oil and Gas Leases: Suspension of Operations and Production

Where, before the end of the initial 5-year term of competitive leases, an order forbidding drilling on the leases is issued, the fact that the order is in accordance with a stipulation which is a part of the oil and gas lease does not preclude suspension of the leases in accordance with section 39 of the Mineral Leasing Act.

APPEAL FROM THE GEOLOGICAL SURVEY

Texaco, Inc., has appealed to the Secretary of the Interior from a decision of February 25, 1960, by the Director of the Geological Survey affirming, in effect, the denial by the Regional Oil and Gas Supervisor, Roswell, New Mexico, of the appellant's application for relief from operating requirements under oil and gas leases New Mexico 016808 and 016809. The appellant's application, filed on December 16, 1959, pursuant to 30 CFR 221.39,¹ also requested that the leases be suspended and their terms correspondingly extended for any period of time during which the applicant was not permitted to drill for oil and gas on the leased lands on account of potash development thereon.

The Texas Company, predecessor in interest of Texaco, bought the two leases involved in this appeal at competitive bidding on October 15, 1954, for a cash bonus of more than \$20,000. The leases cover 640 acres of land in Eddy County, New Mexico, which land is within the defined limits of the geologic structure of Leo oil and gas field and also contains valuable deposits of potassium ore. On October 16, 1961, the Secretary issued an order providing for concurrent operations for the development and production of both oil and gas and the potassium deposits on lands owned by the United States within an area designated as "potash area" in Eddy and Lea counties, New Mexico.² (See Secretary's order of October 16, 1951, "Oil and Gas and Potash Leasing and Development within Potash Area—Eddy and Lea Counties, New Mexico," and memorandum recommending the order by the Director, Geological Survey, which the Secretary approved on October 16, 1951.) The lands here involved are within the potash area referred to in the order of October 16, 1951, and are covered by two potash leases. The order provides, *inter alia*, that oil and gas leases will be issued on lands within the potash area only on condition that the prospective oil and gas lessees

¹ 300 CFR 221.39 provides: "Applications for any modification authorized by law of the operating requirements of a lease for lands of the United States shall be filed in triplicate * * * with the supervisor, and shall include a full statement of the circumstances that render such modification necessary or proper. Applications for any modification authorized by law of the royalty or rental requirements of a lease for lands of the United States shall be filed in triplicate in the office of the supervisor."

² The "potash area" includes lands in State and private ownership in addition to lands owned by the United States.

agree to a stipulation regarding the dual development of the land for potash and for oil and gas. Paragraph (c) of the stipulation provides:

(c) No wells will be drilled for oil or gas at a location which, in the opinion of the Oil and Gas Supervisor of the Geological Survey, would result in undue waste of potash deposits or constitute a hazard to or unduly interfere with mining operations being conducted for the extraction of potash deposits.

Thus, by stipulation, the appellant's leases permit drilling only on those parts of the leaseholds where drilling will not be unduly wasteful or hazardous to the development of the potash deposits in the land. It is noted in this connection that section 4 of the oil and gas lease form here involved (Form 4-213, February 1952) also contains a provision restricting development as follows:

Drilling and producing restrictions.—It is agreed that the rate of prospecting and developing and the quantity and rate of production from the lands covered by this lease shall be subject to control in the public interest by the Secretary of the Interior, and in the exercise of his judgment the Secretary may take into consideration, among other things, Federal laws, State laws, and regulations issued thereunder, or lawful agreements among operators regulating either drilling or production, or both. After unitization, the Secretary of the Interior, or any person, committee, or State or Federal officer or agency so authorized in the unit plan, may alter or modify, from time to time, the rate of prospecting and development and the quantity and rate of production from the lands covered by this lease.

The appellant's leases were issued as of February 1, 1955, for 5 years and so long thereafter as oil or gas is produced in paying quantities, and, in the absence of the suspension of the lease term or unless extended by production in paying quantities, the leases expired on January 31, 1960.

On May 1, 1959, the appellant's sublessee under a farm-out agreement filed with the Geological Survey's Artesia district office a request for a drilling permit to drill a well on land included in New Mexico 016809. The appellant's sublessee also notified the potassium lessee of the proposed drilling on the land. The potassium lessee opposed drilling by the oil and gas lessee on the ground that the prospective well would penetrate commercial potash deposits which the potassium lessee planned to mine in the near future. The potassium lessee's objection resulted in a hearing before an official of the New Mexico Oil Conservation Commission. It appears that the appellant's sublessee was planning to drill 8 wells on these lands, and, according to the potash lessee's representative, a pillar 1,000 feet in radius would have to be left around each oil well in the ore body and the loss of ore in such a pillar would be 200,000 tons. The potassium lessee objected to any drilling for oil and gas on the lands included in these two leases, and no agreement could be reached be-

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tween the potash lessee's representative and the appellant's sublessee. The oil and gas supervisor concluded that drilling for oil and gas within the potash ore body would result in undue waste of potash and otherwise interfere with mining operations, denied the appellant's request for a drilling permit, and the appellant and its sublessee were informed before July 1, 1959, that it was doubtful that the Geological Survey would approve drilling within the area. The record indicates that the appellant has been prevented from drilling on the lands included in both of its leases because drilling would result in waste of potash ore.

On December 16, 1959, the appellant filed its application for relief from the operating requirements under these leases and for the suspension of the leases. In addition to the matters already set forth here, the application stated that the appellant had spent approximately \$10,500 in geophysical work on the leases, and that it was restrained from all drilling operations and consequently deprived of the privilege of developing its leaseholds.

Section 39 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 209), provides in part here pertinent:

* * * In the event the Secretary of the Interior, in the interest of conservation, shall direct or shall assent to the suspension of operations and production under any lease granted under the terms of this Act, any payment of acreage rental or of minimum royalty prescribed by such lease likewise shall be suspended during such period of suspension of operations and production; and the term of such lease shall be extended by adding any such suspension period thereto. The provisions of this section shall apply to all oil and gas leases issued under this Act, including those within an approved or prescribed plan for unit or cooperative development and operation.

The pertinent regulation provides:

* * * As to oil and gas leases, no suspension of operations and production will be granted on any lease in the absence of a well capable of production on the leasehold, except where the Secretary directs a suspension in the interest of conservation. * * * 43 CFR, 191.26(a).

Texaco's application for relief from the operating requirements of the leases and the suspension of the leases was based upon these provisions of the statute and regulations.

The Director of the Geological Survey, to whom the application was transmitted, rejected it for reasons stated in a memorandum dated January 28, 1960, of the Associate Solicitor to whom he had referred it. This memorandum, in turn, held that the disposition of the application was controlled by a memorandum dated March 24, 1959, of the Acting Solicitor which held that an application for suspension of operations under oil and gas lease Las Cruces 060585 and others could not be granted, stating that the Secretary's authority to suspend

operations or production or both was found in either section 17 of the Mineral Leasing Act (30 U.S.C., 1958 ed., sec. 226) or section 39 of that act (*supra*); that in either case the authority to grant a suspension was limited to those in the interest of conservation; that restrictions on drilling under the Department's order of October 16, 1951, "negatives any claim that the suspension would conserve the potash deposits;" and that the proposed suspension was not in the interest of conservation and therefore not within the law.

The January 28, 1960, memorandum pointed out that the only differences between the Texaco leases and the earlier ones were that Texaco's were issued competitively and the potash lessee indicated it would mine shortly. It then stated that "Just as with the case discussed in the March 24, 1959, memorandum, there is no question but that a suspension of operations would result in the conservation of either oil and gas or potash," and concluded that because the terms of the lease prevent operations that do not conserve oil and gas or potash, no suspension of operations or production is necessary or permissible.

On appeal Texaco contends that its leases and the stipulations attached to them were intended to insure the compatible use of land by both it and the potash lessee, that the refusal to issue it a permit to drill was in derogation of its rights under its leases, and that, permission to drill having been refused, the denial of its request for a suspension means that it acquired no rights under its leases and that, if this is so, the leases ought to be rescinded. It further urges that the Acting Solicitor's memorandum of March 24, 1959, was based upon findings that the lessee could have drilled, but did not, and that a suspension would not be in the interest of conservation; that neither of these assumptions is applicable to its situation; and that, therefore, its application is not governed by the memorandum of March 24, 1959.

Since for the reasons stated below, I have concluded that the appellant is to be granted the suspension it seeks, a discussion of the first part of its argument is unnecessary.

As section 39 and the pertinent regulation plainly state, the Secretary may suspend operations and production on a lease when to do so is in the interest of conservation. In the case of an oil and gas lease a suspension will be granted in the absence of a well capable of production on the leasehold only if the Secretary directs or assents to a suspension in the interest of conservation.

That the order was in the interest of conservation seems self-evident, as the record indicates that the appellant has been prevented from drilling on the lands in the leases because drilling would result in the waste of potash ore. Surely the order prohibiting drilling under

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oil and gas leases to prevent the waste of potash ore was made in the interest of conservation, specifically, in the interest of conserving potash. Consequently, the absence of producing oil wells on these leaseholds is not a bar to the suspension of operations and production under section 39 because the order prohibiting drilling is in the interest of conservation and thus within the exception to the provision requiring a well capable of production on a leasehold before a suspension under section 39 will be granted.

Nevertheless the memoranda on which the Director relied held that where oil and gas lease operations are suspended as a result of orders restricting drilling locations or completely prohibiting drilling to prevent the waste of potash, the leases may not be suspended under section 39 because the orders restricting or prohibiting operations are not in the interest of conservation. The conclusion is apparently based upon the fact that in the cases under consideration in the Acting Solicitor's memorandum as in the instant case, stipulations in the lease, agreed to by the lessors, expressly provided for the possibility that operations might be curtailed or prohibited to protect potash ores. The memoranda seem to hold that if before the Secretary (or his designee) issues an order restricting or forbidding producing or operating, a lessee agrees to such restriction by stipulation which is made a part of the lease, the agreement precludes allowance of a suspension under section 39. However, in considering the applicability of section 39 of the Mineral Leasing Act, no valid reason suggests itself for distinguishing, as the cited memoranda do, between leases which do and those which do not contain stipulations or provisions restricting or limiting operations and production under designated conditions. A stipulation restricting or limiting operations states specific conditions under which the Secretary's general authority to limit operations may be exercised; but an order restricting all operations and production under any lease, whether or not it contains specific stipulations, may be issued if the public interest warrants. (*cf.* section 4 of this lease).

Moreover, that the Department has rejected the construction implicit in the Director's decision of the effect of a restrictive drilling provision in a lease is shown by departmental practice with respect to "(b)" leases, issued under section 14 of the Mineral Leasing Act (41 Stat. 442). In 1934, (b) leases were issued subject to a restricted drilling clause which permitted the lessee to drill only wells needed to offset drainage unless otherwise authorized or directed by the Secretary (*Max L. Krueger, Vaughan B. Connelly*, 65 I.D. 185, 188 (1958); Circulars No. 1294 and No. 1341, 54 I.D. 181 (1933), and

55 I.D. 67 (1934)).³ Departmental regulations expressly stated that the provisions of section 39 of the Mineral Leasing Act regarding suspension of operations and production apply to leases where, in the interest of conservation, suspensions of operations and production have been or may be directed or assented to by the Secretary of the Interior whether the form of suspension is by order of the Secretary by reason of the restricted drilling clause inserted in the secondary or (b) lease, or by the granting of such relief upon application by the lessee (see Circulars 1294 and 1341 (*supra*)). There appears to be no basis for distinguishing between the effect of a restricted drilling clause in the (b) leases and a lease stipulation like that here involved in deciding whether an order forbidding drilling should be considered a suspension of operations and production within the scope of section 39. Accordingly, to the extent that the Director's decision implied that the Secretary's assent to a suspension of operations could not be in the interest of conservation in the instant case because of the lease stipulations here involved, the decision is not correct.

Similarly the Department's ruling under the (b) leases indicates that it determined shortly after section 39 was added to the Mineral Leasing Act by the act of February 9, 1933 (47 Stat. 798), that the denial of permission to drill on a lease on which there is no well capable of producing also grants relief from the producing requirements of the lease. Instructions issued on November 14, 1934, provided:

The drilling and producing requirements of oil and gas leases are separate and distinct requirements, and relief from either or both requirements may be granted after receipt of appropriate application. Relief from the drilling requirements of a lease which has no wells capable of producing oil or gas grants concurrent relief from the producing requirements of that lease. Suspension of payment of acreage rental will be effective in case there is approved drilling and producing relief or approved drilling relief with no wells on the lease capable of producing. 55 I.D. 68.

Inasmuch as the record in this case indicates that the refusal to permit drilling on these leases amounted to an order prohibiting all operations and production thereon and that the order was in the interest of conservation, the appellant's application for suspension under section 39 may be allowed, subject to such reasonable limitations as the Director of the Geological Survey may impose.

³ Section 14 of the Mineral Leasing Act under which (b) leases were issued provided that upon a discovery of oil or gas on land included in a prospecting permit issued under section 13 of the act, the permittee became entitled to a lease carrying a 5 percent royalty rate for one-fourth of the land in the permit and to a preference right for a lease with a royalty rate of not less than 12½ percent for the remainder of the land in the permit. The 5 percent lease was called an (a) lease and the 12½ percent lease was a (b) lease.

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For the reasons discussed herein, the decision of the Director of the Geological Survey is reversed and the case is remanded for action consistent with this decision.

JOHN A. CARVER, Jr.,
Assistant Secretary of the Interior.

APPEALS OF ERHARDT DAHL ANDERSEN

Decided July 17, 1961

IBCA-223

IBCA-229

Contracts: Changed Conditions

Under a standard-form "changed conditions" clause the Government assumes the risk that subsurface conditions will conform to those described in the contract or, if not there described, to normal conditions. The clause, in prescribing a standard of normal conditions, anticipates that the contractor's bid will reflect neither undue optimism nor undue pessimism.

An evaluation of subsurface conditions based on the theory that the contractor was entitled to assume the best possible conditions consistent with the information given in the contract is not compatible with the clause, and an evaluation based on the theory that the contractor was bound to assume the worst possible conditions consistent with such information is likewise not compatible with it.

In applying the clause information concerning the conditions generally prevailing in an area is less significant than information concerning the conditions at the very site of the work to be done.

Contracts: Changed Conditions

In evaluating subsurface conditions for the purposes of a "changed conditions" clause, references to "water" in logs of test wells set out in the contract drawings are not, standing alone, to be read as indications of the amount, velocity or pressure of the water. If, in addition, the observable physical conditions in the area indicate that large quantities of water are generally prevalent in the underground formations, the encountering of large quantities of underground water at the job site does not constitute a changed condition. If, however, the observable physical conditions do not afford a basis for reasonably reliable conclusions with respect to the probable hydrostatic pressure of the water at the job site, then the encountering of hydrostatic pressure to a degree that is substantial for the particular formations in which it is encountered does constitute a changed condition of the second category.

Determination of the amount of the equitable adjustment to be made in such a case requires analysis of the various classes of expense incurred by the contractor, for the purpose of distinguishing those which were attributable to the changed condition from those which were within the range of the costs that should have been anticipated by the contractor when bidding, or where due to errors in selecting and implementing the methods of operation to be pursued.

Contracts: Interpretation

The word "approximate" in a contract drawing can comprehend substantial variations from the figure to which it is annexed if such variations are commensurate with the other provisions of the contract and with the exercise in good faith of the discretion reposed in the contracting officer by them.

Contracts: Interpretation

Where a contract contains a direction to achieve a result that is related in part to a facility expressly excluded from the contract, the physical, functional and monetary relationship between such result and such facility, as well as the specific terms, history and general scheme of the contract provisions are to be taken into account in determining the extent to which such direction constitutes a part of the requirements of the contract.

BOARD OF CONTRACT APPEALS

This case involves two timely appeals from decisions of the contracting officer, both of which arise under the same contract.

The contract in question, No. 14-20-500-692, was entered into by the Bureau of Indian Affairs with appellant under date of July 31, 1957. It provided for the construction of a pumping station alongside the Portneuf River about eight miles downstream from Pocatello, Idaho. This station was intended to pump water from the river for use on the Michaud Flats Unit of the Fort Hall Indian Irrigation Project. The contract was in the main a lump-sum contract, the total stated price for all items being \$326,645.00. It was on Standard Form 23 (Revised March 1953) and incorporated the General Provisions of Standard Form 23A (March 1953) for construction contracts.

The first appeal, IBCA-223, is from two decisions in which the contracting officer denied claims for additional compensation in the amount of \$347,023.18¹ on account of expenses allegedly incurred by reason of the large quantities of subsurface water encountered in excavating for the pumphouse.

The second appeal, IBCA-229, is from a decision in which the contracting officer sustained a deduction in the amount of \$750.00 from the contract price on account of the nonplacement of backfill along the discharge side of the pumphouse.

¹ These claims comprise eight separate items. When the claims were presented to the contracting officer, dollar figures were not given for some of the smaller items. The items for which dollar figures were given aggregated \$340,407.37. In the release on contract, dated January 13, 1960, changes were made in some of the amounts, and dollar figures were furnished for the remaining items. The aggregate of the eight items, as reserved in the release, was \$347,160.85. At the hearing item 5 was reduced from \$1,200.00 to \$1,062.33, thus decreasing the aggregate to that stated in the text.

*July 17, 1961**IBCA-223*

The fundamental question presented by this appeal is that of determining whether any of the water encountered at the job site amounted to a changed condition within the meaning of Clause 4 of the General Provisions of the contract. Appellant testified that in estimating his bid he included the sum of \$10,000.00 for dewatering expenses. It is apparent from the evidence that the amounts actually spent for dewatering and related operations, while not necessarily equal to those alleged, were, nevertheless, far greater than \$10,000.00. Appellant contends that the difference is, in general, chargeable to the Government under Clause 4.² The Government contends that no more water was encountered than a prudent contractor would have anticipated on the basis of the contract drawings and specifications and of the observable physical conditions in the vicinity of the job site, and that, therefore, the entire loss must be borne by appellant.

Clause 4 applies to two categories of changed conditions. The first comprises "subsurface or latent physical conditions at the site differing materially from those indicated in this contract." The second comprises "unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract." The two categories are expressed in the alternative, and, hence, a contractor is entitled to relief under Clause 4 if he succeeds in proving that he has encountered a condition which falls within the scope of either category.

What Happened

As a first step in analyzing the problem of whether a changed condition was encountered, it is necessary to ascertain what physical conditions were found at the site as the work of excavating for the pumphouse progressed, and what was done about those conditions.

At the site of the pumphouse the natural ground surface was approximately at elevation 4380. The lowest portions of the pumphouse proper were to be at elevation 4346, that is, about 34 feet below the natural ground surface, but at one corner a sump was to extend three feet deeper. These portions of the structure were to be about 60 feet long by about 40 feet wide. They were to be supported by a horizontal slab of unreinforced concrete about 70 feet long by about

² In computing the amount of the claims, appellant excluded sums equivalent to the excavation, pumping and cleanup costs which, he considered, would have been incurred had no changed condition been encountered. The total of the sums so excluded is \$23,-264.37, of which \$7,788.37 is for pumping costs.

50 feet wide, and three feet thick. The underside of the slab was to be at elevation 4343, except that below the sump it was to be at elevation 4340. The slab in its turn was to be supported by wooden piles. These piles were shown on the contract drawings as extending down to approximately elevation 4325, but were actually driven to somewhat greater depths, the lowest being driven to elevation 4307.5. Above elevation 4357 additional rooms at either end of the pumphouse were to increase its length to about 100 feet.³

The Portneuf River passed within approximately 200 feet of the intake side of the pumphouse. Construction of the forebay and other intake works to bring the water to the pump inlets was not included in the contract. The normal surface level of the river was at elevation 4366, while the maximum level was about four feet higher and the minimum about four feet lower.

Construction of the pumphouse necessarily entailed excavation to elevation 4343 (elevation 4340 for the sump) in order to allow placement of the concrete slab on which most of the structure was to stand. Thus the necessary excavation had to go down to a level that not merely was 37 feet below the natural ground surface, but, more significantly, was 23 feet below the normal water surface in the neighboring river (40 feet and 26 feet, respectively, for the sump). Furthermore, at some time before the slab was poured, it would be necessary to drive to still greater depths the wooden piles that were to provide bearing for the structure as a whole.

The subsurface materials at the site of the pumphouse consisted of alluvial deposits laid down and eroded by the Portneuf River in the course of past meanderings. Four of the strata present are of particular significance for the purposes of this case. In descending order these were (1) a stratum of soggy clay extending from about elevation 4360 to about elevation 4352, (2) a stratum of sand extending from the underside of the soggy clay to about elevation 4332, (3) a stratum of stiff clay extending from the underside of the sand to probably about the vicinity of elevation 4322, and (4) a stratum composed of less clearly identifiable material, but seeming to contain gravel, compacted sand, and clay, that extended from the underside of the stiff clay to indeterminate depths. The two clay strata were relatively impervious, the sand stratum between them proved to be highly pervious, and the lowest stratum appears to have had a considerable degree of permeability.

Appellant initially planned on digging an open-pit excavation, having unsupported sides sloping back at an angle varying between

³ The room at the east end was provided for in the contract as awarded; that at the west end was added by a change order.

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2 to 1 and 1 to 1. He initially planned on dewatering this excavation through an open trench leading to the river until the excavation approached the water level in the river, and, thereafter, through open pumping by surface pumps. He expected that through such measures it would be possible to perform substantially in the dry the operations of diggings the excavation, driving the piles, and placing the concrete slab. These considerations formed the basis on which appellant arrived at his estimate of \$10,000.00 for dewatering expenses.

The excavation was begun in the manner planned. Some of the strata above the soggy clay turned out to contain appreciable quantities of water which flowed into the excavation and caused some caving of its sides. Appellant, however, was able to dispose of the water through the trench leading to the river and through the use of the surface pumps, and appears not to have been greatly concerned over the caving. This state of affairs continued until the excavating equipment pierced through the soggy clay into the underlying sand. Then troubles aplenty broke loose.

The sand stratum proved to contain much water, and the water proved to be under substantial hydrostatic pressure. Once the confining stratum of soggy clay was pierced, the pressure caused the water to flow into the excavation at a rapid rate. This flow came not only from the sides of the excavation, but also from "boils," that is, springs, which developed in the floor of the excavation. Nor was the inflow of water the only problem. The water moved with sufficient velocity to carry into the excavation very fine material, such as silt and clay, together with coarser material, such as sand, eroded from the formations through which it flowed. At times the water-borne material moved in so swiftly as to build up a deposit a foot or so thick in a few hours. This erosion of material from the surrounding formations caused, in turn, subsidence of the earth around the excavation, thereby making it difficult to provide a satisfactory base for the excavating equipment. It soon became obvious that a situation had arisen with which open pumping alone could not cope.

Appellant sought to meet the problem by installing a cofferdam completely around the excavation. In general, the cofferdam was placed at or close to the outer edge of the space to be occupied by the concrete slab. It was composed of a single line of steel sheet piling. The individual piles were approximately 20 to 22 feet in length, and their lower ends were driven to about elevation 4336. Thus, the bottom of the cofferdam, while it extended several feet below the lowest point to which excavation was to be carried, failed to reach the top of the stiff clay by about four feet. A possible exception was at the sump, where 28-foot piles were used. After installation of the cofferdam

appellant endeavored to keep the interior of the excavation dry through continued use of surface pumps.

The cofferdam was of considerable help, but it did not by any means solve the problem. Large quantities of water and water-borne material kept flowing up through the floor of the excavation, and the earth around the excavation continued to subside. Portions of the cofferdam manifested a tendency to collapse and interior bracing had to be installed in order to counteract this tendency.

There is a conflict in the testimony concerning the reasons why the inflow continued. A preponderance of the evidence supports the view, which we find to be correct, that the continued pumping from within the excavation resulted in the hydrostatic pressure within the cofferdam being considerably less than the hydrostatic pressure outside the cofferdam. In consequence, water was forced from outside the cofferdam through the four feet or so of sand beneath the bottom of the sheet piling into the sand underneath the excavation, causing boils to erupt in its floor. As the water flowed it naturally tended to open up channels in the sand, and these channels in turn naturally facilitated both the volume and the velocity of its movement. Also, as it flowed it carried with it into the excavation material eroded from the surrounding formations, thereby tending to undermine the cofferdam and the earth around it.

Appellant's next measure for combatting the water was to install well points in the area surrounding the cofferdam. Each well point consisted, in substance, of a tube having at its lower end a screened opening and at its upper end a connection with a system of piping leading to a pump, all designed to suck the water out of the formation into which the well point was driven. Experimentation revealed that well points driven into the stratum of sand soon became so clogged with fine material that little water could be sucked out through them, whereas well points driven to greater depths produced a good yield of water. In consequence, most of the well points were driven through the stratum of stiff clay to approximately elevation 4320. The system initially installed compromised about 100 well points. A second system containing about the same number of well points was quickly added.

Somewhat later, appellant dug a deep well, with a diameter of 10 inches, just outside one corner of the cofferdam. This well was not provided with the gravel envelope needed for the efficient functioning of a pumped well in formations such as those present at the job site. As a result the deep well produced little water, and pumping of it was soon abandoned.

By a combination of pumping from outside the cofferdam through the 200 well points and of pumping from within the cofferdam through

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surface pumps, appellant was able for a while to keep the excavation dry enough for work to go ahead. During this period the greater portion of the area to be occupied by the concrete slab was excavated to substantially its full depth, and the work of driving the wood bearing piles was begun. The first pile was driven under the supervision of a Government engineer in order to test the bearing value of the formations, and to provide a basis for establishing the pattern of spacing and depths to be observed in driving the remaining piles. By direction of the Government engineer this pile was driven to approximately elevation 4318. Within 24 hours after it was driven a boil had developed around it. As other piles were driven boils developed around some of them also. The inflow rapidly became too great to be overcome by the pumps, and the floor of the excavation rose through the deposition of the material carried in by the water.

Here again there is a conflict in the evidence as to the reason for the inflow. We find that to some extent the cause was the puncturing of the stiff clay by the bearing piles, whereby cracks or breaks were created through which water was pushed upward by hydrostatic pressure in the formations underlying the stiff clay. We also find that to some extent the cause was the long-continued pumping from within the excavation, which as it went on opened up more and more channels through which more and more water could flow into the excavation below the foot of the cofferdam. The record provides no basis on which it could be accurately determined how much of the inflow was due to the one cause or to the other.

Appellant's response to the added influx of water was to install a third system of well points, thus increasing their total number to approximately 300. The three systems appear to have withdrawn from the underground formations, except during shut-downs for repairs or adjustments, approximately 500,000 gallons of water per hour. Nevertheless, they were altogether inadequate to intercept the large quantities of water that were by now flowing through the underground channels into the excavation. A consulting engineer who was brought to the site by appellant advised him that pumping capacity five times as great as that which had been installed would be needed in order to perform in the dry the remaining foundation operations.

After receiving this advice appellant determined to resort to underwater construction procedures. The water was permitted to rise within the excavation until it approached the top of the cofferdam at approximately elevation 4357. This neutralized a large part of the hydrostatic pressure exerted by the water in the formations surrounding the excavation, and thereby reduced the flow of water to

amounts that could be controlled by the well points and the surface pumps. The remainder of the wood piles for the concrete slab were driven through the water. The unexcavated material at the bottom of the excavation, together with the material that had been carried in by the water, was removed by using two pumps in conjunction, one to create a jet of water for loosening the material, the other to suck or dredge it out of the excavation. The concrete slab was then placed under water by use of what is known as the tremie method of pouring. Finally, the excavation was pumped out with surface pumps.

The placement of the concrete slab ended most of appellant's water troubles. The slab extended to the steel sheet piling and functioned as a seal which cut off the flow of water into the bottom of the excavation. There was, nevertheless, some infiltration of water through the joints of the sheet piling and along the line where the slab met the piling. This infiltration was controlled by the well points and the surface pumps until the pumphouse structure had been completed to a point where the water no longer interfered with its construction. In addition, there were some special infiltration problems in the sump area, but these were alleviated through certain changes in the specifications which, it was agreed, were not to affect the contract price.

Apart from the changes just mentioned, the Government took no steps to assist appellant in solving its water problems. Appellant gave written notices to the contracting officer that he had encountered what he considered to be changed conditions, but did not request advice as to ways and means of overcoming those conditions. The contracting officer had investigations made of the alleged changed conditions, but merely informed appellant that, in his opinion, the contract provisions were sufficient to alert bidders to the possibility that conditions such as those alleged would be encountered. The Government engineers and inspectors considered that it would be improper for them to give advice about construction methods to appellant, and, with minor exceptions, studiously refrained from doing so.

What Was To Be Known

We turn now to the question of what subsurface conditions at the site of the pumphouse were reasonably foreseeable, as of the time when the bids were required to be submitted, in the light of the information disclosed by the contract or obtainable by such an investigation as a prudent bidder would make. Section 30 of the specifications enjoined bidders to "make a complete examination of the sites so that all contracting hazards may be evaluated," and, in this connection, stated that "subsurface conditions shall be appraised."

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The contract drawings contained logs of three test wells that had been drilled in the immediate vicinity of the job site. While none of these test wells were within the perimeter of the pumphouse, all three were within 125 feet or less of its perimeter. Both parties have treated these three test wells as sufficiently close to afford reliable indications of the conditions at the site, and have projected the various strata shown on the logs to the site itself by the process of interpolation. Two of the test wells penetrated to a depth of 67 feet below the surface, while the third was four feet shallower. In comparison, the approximate depth to which the bearing piles were to be driven, as shown on the drawings, was 55 feet below the surface, and the actual depth attained by the most deeply driven pile was 72.5 feet below the surface.

The drawings also contained the log of a fourth test well. Unlike the other three, the location of this well was not shown on the drawings, but it was, in fact, about 800 feet from the perimeter of the pumphouse. Neither party has attached as much significance to this test well as to the others. In our opinion, its location was such as to make it a much less reliable indicator of conditions at the site than the other three. Hence, while we have taken it into account in our findings, we have accorded it considerably less weight than the others.

The pattern of stratification indicated by the three test wells near the site conformed closely to that actually encountered.

Appellant contends, however that the material encountered differed from the material shown on the logs in that appreciable quantities of silt and fine sand were removed from the excavation, whereas the logs did not mention silt or fine sand. This contention is supported by a laboratory analysis of a sample of the excavated material which shows that the sample analyzed consisted of 51% fine sand, 44% silt, and 5% clay. For a number of reasons this analysis cannot be accepted as persuasive evidence of the proportion of silt present. First, it is based on only a single sample. Second, the sample was taken from a waste pile under circumstances which preclude identification of the particular stratum where it originated. Third, while the analysis is stated to have been made in accordance with standard ASTM (American Society for Testing Materials) specifications, the classification was made by using 0.05 millimeters as the line of demarcation between sand-size particles and silt-size particles, and by using 0.005 millimeters as the line of demarcation between silt-size particles and clay-size particles. ASTM Specification D653-60 indicates, however, that while 0.05 mm. and 0.005 mm. are used in some cases, the more general practice is to use 0.02 mm. as the line between sand-

size and silt-size, and 0.002 mm. as the line between silt-size and clay-size. On the basis of these latter demarcations, the sample would consist of approximately 86% fine sand and 14% silt. Fourth, the classification appears to have been made solely on the basis of particle size, and to have taken no account of other factors, such as cohesiveness, that can have significance for soil classification purposes.

On the record as a whole we find that the material encountered did not differ materially from the descriptions given in the logs. The brevity of the descriptions obviously precluded their being read as more than a thumb-nail sketch of the outstanding characteristics of the strata. Also important is the fact that soils frequently contain more than one component, and frequently are identified by the name of their predominant component. For both of these reasons such a description is that exemplified by the word "sand," which in two of the key logs is the only description given for the sand stratum that ultimately caused so much trouble, cannot reasonably be constructed as a representation that the sand would contain no silt. Even less could such a description be construed as a representation that the sand was not a fine sand. While some silt appears to have been encountered, there is no reliable evidence that it was sufficient to make the descriptions materially erroneous, and while some fine sand was encountered, sand is still sand, whether it be fine, medium or coarse.

The really fundamental problem is not what the contract drawings indicated in the way of material, but what they indicated in the way of water. The logs of the three test wells near the job site, as set out in the drawings, contained, respectively, 3, 3 and 4, or a total of 10, references to water. Of these references 5 applied to strata above the soggy clay, that is, to strata in which the water encountered did not exceed appellant's expectations. The remaining 5 references were, in descending order, as follows: On two logs, those for test wells Nos. 2 and 3, the word "water" appeared opposite the line marking the top of the sand stratum; on the same two logs, the word "water" also appeared opposite the line marking the bottom of the sand stratum; and on the log of well No. 1 the word "water" appeared opposite a 2-foot thick formation described as "gravel" immediately below the stiff clay. The log of the more distant test well, No. 4, contained 3 references to water, one of which applied to a stratum close to the surface. The remaining 2 were, in descending order, as follows: Opposite the top of a stratum of sand, which conceivably could be the same sand stratum that was troublesome at the site, the word "water" appeared, but opposite the middle of this stratum the words "not water producing" appeared; opposite a 9-foot stratum marked "sand, gravel and clay" immediately below the stratum of sand the words

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"much water" appeared. This last was the only instance in the logs where a reference to water was accompanied by an indication of the amount of the water.

Unfortunately, the logs omitted much significant information concerning water that appeared in the notes made by the commercial well driller who had drilled the test wells for the Government. The notes mentioned the presence of water at several locations where water was not mentioned in the logs. What was more important, the notes contained measurements of static water heads, that is, of the elevation to which the water rose after a particular water-bearing stratum had been struck by the well driller. They also frequently characterized the sands encountered by him as being "quick," a term which would suggest the possibility that the material in those sands was capable of flowing freely if conditions should be created whereby water was caused to pass through the sands at a substantial velocity. The evidence indicates that the information concerning static water heads was omitted from the drawings purely by inadvertence, but that the term "quick" was omitted intentionally because the well driller's notes also included statements to the effect that the sands would stand without casing, and because the Government engineers considered that sands which would stand without casing could not be aptly described as "quick." Whether this was a sound conclusion it would be difficult to say, for the term "quick" as applied to sand seems to have no accepted precise definition. In any event, however, the unintentional omission of the data as to static water heads was of greater practical significance.

Had the measurements of static water heads been included in the drawings they would have revealed that the water in the formations surrounding the pumphouse site was under substantial hydrostatic pressure. These measurements disclosed that when the stratum of sand underlying the soggy clay was penetrated the water rose in No. 2 well to about 27 feet above the top of the sand, and rose in No. 3 well to about 36 feet above the top of the sand. They also disclosed that when the stratum underlying the stiff clay was penetrated the water rose in No. 1 well to about 52 feet above the top of that stratum, rose in No. 2 well to about 46 feet above the top of that stratum, and rose in No. 3 well to about 50 feet above the top of that stratum. With respect to No. 4 well, they disclosed that the water in the stratum marked "much water" rose to about 42 feet above the top of the stratum. Finally, static water heads, although of lesser amount, were shown for water-bearing strata above the soggy clay.

All in all, the logs contained in the contract drawings were much more neutral in their indications of possible water problems than

were the original notes of the well driller. The notes were not mentioned in the contract, and appellant first learned of their existence after the excavation had been dug.

The specifications made mention of water in connection with the placement of the concrete slab, or pad, on which the pumphouse was to stand. Section 39 stated, in part:

The Contractor shall pour a three foot slab of concrete over this area after the bearing piles are driven. This concrete slab shall be poured by the tremie method, if unwatering is impracticable.

Section 49 stated, in part:

In order to facilitate construction it is anticipated that a water seal may be required so that the actual pumphouse substructure may be completed without undo [sic] interference from water conditions. It is required that after the piles are driven in this area, a three foot concrete pad be placed * * *.

Concrete of at least 7 sacks per cubic yard shall be placed under water for this pad. It shall be placed by a tremie pipe.

In the drawings the slab was labeled "tremie concrete," a term which an experienced contractor would understand as meaning concrete poured under water.

There were also provisions in the specifications relating to the driving of sheet piling around the pumphouse site, but no mention was made of water in these provisions. Section 2 stated, in part:

The pumphouse structure will be placed on a pile foundation. This item will require driving of wooden piles and possibly steel sheet piling. Steel sheet piling may or may not be used in the foundation work of the structure. If used, it may be withdrawn. The drawings show possible locations for driving the sheet piling if it is used.

Section 39 stated, in part:

Steel sheet piling may be used about the pumphouse. The sheet piling if used shall be placed to give a clearance of at least 5 feet about all parts of the concrete substructure. The piling may be removed after its usefulness about the pumphouse is past, if such removal can be made without damage to any part of the pumphouse or foundation.

Section 49 stated, in part:

If sheet piling is not used, the edge of tremie concrete pad shall be the same as if sheet piling was used.

In the drawings sheet piling was shown as extending completely around the pumphouse and as penetrating to elevation 4325, that is, about 11 feet lower than the depth to which appellant drove most of his sheet piling.

It is pertinent to observe that the contract expressly gave appellant an option either to use or not to use the tremie method for pouring the concrete slab, and also expressly gave appellant an option either to use or not to use sheet piling. It is also pertinent to observe that

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the contract did not attempt to tie the two options together, either by indicating that an election to use one or the other of these procedures would eliminate any necessity for using the other, or by indicating that an election not to use one or the other of these procedures would create a necessity for using the other. Finally, it should be remarked that, while the provisions relating to the slab indicated that the reason for permitting use of the tremie method was the possibility that unwatering might prove impracticable, the provisions relating to the sheet piling did not indicate whether the reason for permitting its use was the possibility that a cofferdam might be needed to check the inflow of water into the excavation or was some other contingency. For example, a contractor conceivably might desire to install sheet piling, even where no water problem was present, because an excavation with vertical sides would permit his equipment to be placed closer to the work, and would reduce the amount of earth to be moved.

Observable physical conditions from which the presence of subsurface water might have been inferred, independently of any indications in the drawings or specifications, were numerous in the vicinity of the pumphouse site. The alluvial character of the valley of the Portneuf River was evidenced by the meandering course of the stream and by the benches present on either side. The pumphouse was to be built at a point where the escarpments separating the valley floor from the higher land of the benches approached to within about one-quarter of a mile of one another. On the same side of the river as the site and within about a mile and a quarter from it, upstream and downstream, there were at least six springs, or clusters of springs, that were large enough to have ponds about them or to give rise to flowing streams, together with other springs or seeps of lesser size. In general, the springs were situated on the valley floor close to the base of the escarpment and at points where the ground surface was at least as high as at the job site.

The evidence also shows that between Pocatello and the pumphouse site the Portneuf River has a very large, and readily observable, increase in the volume of its flow. As no tributary of consequence empties into this reach of the river, it is evident that most of the increase must be due to subsurface inflow. The general lay of the land indicates that the source of the inflow is to be found in the extensive areas of irrigated land around Pocatello. Irrigation water that percolates into the soil in these areas naturally flows downgrade through the alluvial deposits until it reaches the river or pervious formations below its bed.

Prior to bidding on the instant contract appellant had, in the course of performing another contract for the Government, dug a sump less

than 400 feet from the pumphouse site. This sump was situated at the base of the escarpment and was only eight feet deep. Notwithstanding its shallowness, it yielded the water appellant needed for construction purposes.

Appellant also had a commercial well driller dig a well less than 500 feet from the pumphouse site in order to provide domestic water for the Government. The log of this well was available to appellant when bidding on the instant contract, but he did not consult it. The well was located on the bench at about elevation 4411, and was driven to a depth of 85 feet, that is, to about elevation 4326. Between elevations 4379 and 4361 the well driller encountered a stratum of gravel and clay which yielded water that rose 6 feet above the top of the stratum. Between elevations 4361 and 4326 a stratum of clay which did not yield water was encountered. At the latter elevation the well driller struck a stratum that he described as composed of "clean pea gravel" and as containing "lots of water." The hydrostatic pressure in this stratum was sufficient to cause the water to rise to about 66 feet above the top of the stratum, whereupon drilling was discontinued. It will be noted that the well gave no indication of a formation of sand, underlain and overlain by clay, comparable to the water-bearing sand encountered at the pumphouse site between elevations 4352 and 4332. The data in the record is insufficient to admit of a finding as to whether the "clean pea gravel" at elevation 4326 was, or was not, a continuation of the same formation as the gravel and other material penetrated by the bearing piles in the vicinity of elevation 4322.

In total, the observable physical conditions pointed strongly toward the probability that much water would be found in the underground formations at the job site. However, they revealed little concerning the extent of the hydrostatic pressure in those formations. The only measurements of such pressure near the job site of which appellant knew, or should have known, before bidding were the static water heads of the well that had been drilled on the bench under his earlier contract with the Government.

Was There a Changed Condition?

Having thus summarized the indications of water that were available to appellant when he bid, their significance for the purposes of Clause 4 of the contract must be evaluated. The record contains two reasoned attempts at such an evaluation, each made by an engineer skilled in soil mechanics and hydrology, that come to diametrically opposed conclusions.

The view propounded by the expert who testified for appellant is, in essence, that a log of a test well which says nothing about static water heads is properly to be read as meaning that the well was

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tested for static water heads but none were observed; that the notations of water in the logs of test wells Nos. 1, 2 and 3 as reproduced in the contract drawings amounted to a positive statement that only trickling water would be found in the sand stratum encountered between elevations 4352 and 4332; that information obtained by the drilling of test wells at or close to the site of the work is so much more reliable than inferences drawn from surface observations as to make of little weight any surface indications at variance with the test well data; that it is possible for an alluvial deposit to contain clay barriers which break the continuity of a water-bearing sand; and that the drawings would have justified a prudent contractor in predicating the amount of his bid on the assumption that the pumphouse site was surrounded by such barriers.

The principal expert for the Government, on the other hand, took the view that the references to water in the logs of the test wells were, by reason of their number and their positions, indicative of the presence of flowing water in volume; that such references should be read and interpreted in the light of the observable physical conditions in the surrounding area; that the latter were amply sufficient to disclose a high probability of water being encountered in large quantities and under substantial pressure, even if no logs had been included in the drawings; that the existence of clay barriers capable of sealing off the pumphouse site from subterranean inflows on its river side would be almost inconceivable; and that the water conditions actually encountered were no worse than those which a prudent contractor would have assumed to exist for the purpose of determining the amount of his bid.

One guide line pertinent to the issues so drawn is to be found in the basic concept underlying Clause 4. This concept is that the long-run interest of the Government, in seeking to induce bidders to hold allowances for unforeseen contingencies to a minimum, justifies it in assuming the risk that subsurface conditions will conform to those described in the contract or, if not there described, to normal conditions. As said in one of the first decisions interpreting a "changed conditions" clause:

If this situation is not within the contemplation of Article 4, the alternative is that bidders must, in order to be safe, set their estimates on the basis of the worst possible conditions that might be encountered. Such a practice would be very costly to the defendant. We suppose that the whole purpose of inserting Article 4 in the defendant's contracts was to induce bidders not to do that.⁴

The risk thus assumed by the Government with respect to conditions not described in the contract is, however, the risk that they will turn

⁴ *Ruff v. United States*, 96 Ct. Cl. 148, 164 (1942).

out to be abnormally bad; not the risk that they will fall short of being abnormally good. In a very real sense Clause 4 anticipates that the contractor's bid will reflect neither undue pessimism nor undue optimism. To the extent that the drawings or specifications do not purport to describe the subsurface conditions, the contractor is to be guided by the standard of normal conditions set out in that clause.⁵ His bid is not to reflect assumptions that the subsurface conditions will be either better or worse than those which are "ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract," unless he knows or should know that unusual conditions do actually exist at the site. With respect to the application of this standard, the Board has said:

The purpose of article 4, is however, to protect prudent contractors against unforeseen abnormalities, and a contractor who ignores the warnings in the specifications and all warning signs that would have been revealed by a reasonably thorough investigation is not entitled to the benefit of the article. The burden of proving a claim that falls in the second category of the article is a fairly heavy one, since the contractor must show not only that the encountered conditions that were unexpected to him but also that the conditions encountered would have been generally regarded as unexpected by others engaged in the same type of operations. Otherwise, as the Board has said, article 4 would become "the Achilles heel of every construction contract."⁶

In the instant case appellant's expert seems to have based his opinions on the theory that appellant was entitled to assume the best possible conditions consistent with the data contained in the drawings, whereas the principal expert for the Government seems to have based his opinions on the theory that appellant was bound to assume the worst possible conditions consistent with such data. Neither of these theories is compatible with the objectives of Clause 4.

A second pertinent guide line is that information concerning the subsurface conditions generally prevailing in an area is less significant than information concerning the subsurface conditions at the very site of the work to be done. *Christie v. United States*, 237 U.S. 234 (1915), was a case where the Government had improperly omitted, from a contract for the construction of a dam, information obtained through test borings that was indicative of the presence of sunken logs at the dam site, but where the Government contended that this omission was not sufficient to mislead the contractor because the river

⁵ *John A. Quinn, Incorporated*, IBCA-174, 67 I.D. 430, 433-34, 60-2 BCA par. 2851 (November 29, 1960), aff'd on reconsideration, 61-1 BCA, par. 2920 (January 23, 1961); *Wazburg Construction Company*, IBCA-144, 66 I.D. 123, 133-34, 59-1 BCA par. 2122 (March 31, 1959); *Calvada, Incorporated*, ASBCA No. 2062, 56-2 BCA par. 1033 (August 8, 1956), aff'd on reconsideration 57-1 BCA par. 1245 (April 19, 1957); *Ben C. Gerwick, Incorporated*, ASBCA Nos. 2285 and 2512 (June 8, 1956).

⁶ *J. A. Terteling & Sons, Inc.*, IBCA-27, 64 I.D. 466, 484, 57-2 BCA par. 1539 (December 31, 1957), citing and quoting from *L. D. Shilling Company*, IBAC-23 (Supp.), 63 I.D. 105, 118 (April 30, 1956).

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was one in which sunken logs were apt to be found. In overruling this contention the Supreme Court said, at page 241:

The contentions are attempted to be supported by the alluvial character of the river * * *, its tortuosity, its fluctuations between high and low water in winter and summer, and that for twenty years the United States had operated snag boats for the removal of stumps and sunken logs from the channel of the river. But inferences from such facts could only be general and indefinite, and were not considered by the Government as superseding the necessity of special investigations and special reports. It assumed both were necessary for its own purpose and subsequently would be to whose whom it invited to deal with it. Knowledge of the result of such investigations would protect the Government, it might be, against an extravagant price based on conjecture of conditions, and enable contractors confidently to bid upon ascertained and assured data. And how important it was to know the conditions is established by the finding that claimants were put to an expense of \$6,150.00 over what would have been necessary "if the borings sheets had represented the character of the ground with respect to logs."

The *Christie* case was decided under the general law of misrepresentation as applied to a contract which stated that "the material to be excavated, as far as known, is shown by borings * * *, but bidders must inform and satisfy themselves as to the nature of the material," and which contained no "changed conditions" clause. Nevertheless, the reasoning expressed in the quoted passage is as applicable to a claim under such a clause as to a claim under the law of misrepresentation.

This guide line is likewise one with which the opinion of neither expert can be fully squared. Appellant's expert placed too little weight on the showings of water in the logs of the test wells that had been drilled around the job site. Conversely, the Government's expert placed too much weight on the inferences as to hydrostatic pressure deducible from circumstances of less specific applicability to that site.

We proceed, therefore, to our own independent evaluation of the significance of the indications of water.

With respect to the logs of the test wells as incorporated in the drawings, the Board considers that the references to water in the logs were indicative of the presence of water at the pumphouse site, but it does not consider that, standing alone, they were indicative, on the one hand, of only trickling water or, on the other, of flowing water in volume. The decisions under Clause 4 are replete with warnings against reading into statements of physical conditions connotations or deductions as to which the statement itself is silent.⁷ Here the logs

⁷ See, for example, *Flora Construction Company*, IBCA-101, 66 I.D. 315, 324-25, 59-2 BCA par. 2312 (September 4, 1959); *Inter-City Sand and Gravel Company*, IBCA-128, 66 I.D. 179; 180-92, 59-1 BCA par. 2215 (May 29, 1959); *Lord Bros. Contractors*, IBCA-125, 66 I.D. 34, 41-45, 59-1 BCA par. 2069 (February 16, 1959); *Central Wrecking Corporation*, IBCA-69, 64 I.D. 145, 153-59, 57-1 BCA par. 1209 (March 29, 1957).

of the three test wells immediately adjacent to the job site described the water encountered merely by the one word "water." We can find no justification in the record, in the decisions, or in common experience for reading into that one word, as used in the logs, connotations with respect to the amount, large or small, velocity, slow or fast, or pressure, heavy or light, of the water.

True, there is the testimony of appellant's expert that the absence from the logs of any mention of static water heads was the equivalent of a statement in the logs that hydrostatic pressure had not been encountered, but the expert offered nothing to prove that this interpretation was supported by habitual or customary practice among persons concerned with subsurface explorations. Rather, his testimony would seem to reflect merely his own personal judgment as to the method which an owner should follow in testing subsurface formations for water and in reporting the results of such tests to prospective contractors.⁸ Furthermore, even if that method were to be found to be the one generally employed by owners, a prudent contractor still would have lacked reasonable justification for assuming that it had been employed in the present case, since the logs contained none of the quantitative data which, according to appellant's expert, should have been collected and incorporated in them.

With respect to the data available to appellant at the time of bidding as a whole, that is, the logs of the test wells, the specification provisions, the visible surface conditions, and the water in the sump and well dug by appellant, we find that they were indicative of the presence of much water in the formation around and below the pump-house site, but not of the substantial hydrostatic pressure encountered in some of those formations.

It is, of course, common knowledge that alluvial valleys of permanent rivers usually contain a water table which slopes down from the sides of the valley to the level of the river surface.⁹ Here the logs with their references to water, the springs, the increase in the flow of the river, and the sump and well tended to confirm this normal assumption. Moreover, such factors as the number of the springs, the size of the increase in the flow of the river, the reference to "much water" in the log of test well No. 4, and the "lots of water" encountered at the bottom of the well on the bench tended to show that at many places in this particular valley the volume of underground water was large. Since the logs of all three test wells at the site revealed that water had been found at several different levels in each

⁸ See *J. D. Armstrong Company*, IBCA-40, 63 I.D. 289, 300-01, 56-2 BCA par. 1043 (August 17, 1956).

⁹ *Leal v. United States*, 276 F. 2d 378 (Ct. Cl. 1960).

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well, we believe a prudent contractor would have reasoned that the volume of water at the site would probably approximate the large quantities which the observable conditions indicated to be generally prevalent in the valley. These considerations derive added strength from the fact that the site was in the low part of the valley close to the river, and the excavation was to go well below the water level in the river. They are also reinforced by the warning in sections 39 and 49 of the specifications that the water conditions might be such as would necessitate use of the tremie method for placing the concrete slab.

The extent of the hydrostatic pressure is a different matter. The general characteristics of the valley were consistent with the possibility that the water in a particular formation might be under light pressure or under heavy pressure. This would be something that would depend largely upon the arrangement and characteristics of the individual formations. Considerable hydrostatic pressure would naturally tend to build up in a stratum of relatively pervious material, such as sand or gravel, that was overlain by a stratum of relatively impervious material, such as clay, provided there was a source of supply at a higher elevation from which water could percolate into the pervious material, and provided the impervious material was sufficiently continuous to prevent dissipation of the pressure. The logs showed that there were strata of sand or gravel overlain by strata of clay at the pumphouse site, but they did not show anything as to the presence, absence, or degree of hydrostatic pressure in those strata. The irrigated areas around Pocatello were an obvious source of supply, but there was nothing to show that the pattern of stratification was continuous enough to afford an opportunity for substantial pressures to develop at the site. For example, the springs near the base of the escarpment could have been fed by water percolating through the strata that terminated at the escarpment, or they could have been fed by water from lower strata that escaped upward through breaks or cracks in overlying impervious formations. How widely the stratification might vary, even within relatively short distances, was revealed by the fact that the log of the well on the bench showed a formation of clay 35 feet thick at elevations comparable with those at which the sand, that ultimately proved so troublesome, was shown in the logs of the three test wells at the pumphouse site.

The existence in the Portneuf River of a water level higher than some of the pervious strata shown on the logs of the test wells was a circumstance from which hydrostatic pressure at least equal to this difference in elevation could be inferred, provided the stratification were such that water could percolate freely from the river into the

pervious strata at the job site. However, the differences among the logs of test wells Nos. 1, 2 and 3, and between them and the logs of the well on the bench and test well No. 4, were great enough to suggest that, although the river was near, the stratification was sufficiently variable to admit of the possible presence of a clay barrier or other obstruction which would impede the free movement of water from the river to the formations that would be penetrated by the excavation or the bearing piles. The one positive indication of hydrostatic pressure (other than the undisclosed notes of the Government's well driller) was the static water head that developed in the well on the bench, but the stratification indicated by the log of that well differed so materially from the stratification indicated by the logs of the test wells nearer the job site as to preclude satisfactory correlations. We doubt that a prudent contractor would have been able, on the basis of the information available when the bids were submitted, to form any reasonably reliable conclusions with respect to the probable hydrostatic pressure in the formations through which the excavation was to be dug and into which the bearing piles were to be driven.

The Board finds that the hydrostatic pressure encountered at the pumphouse site in each of the water-bearing strata beneath the level of the soggy clay materially exceeded not merely the pressure that appellant expected, but also the pressure that should reasonably have been expected in the light of the data available to him when bidding. When the pertinent legal guide lines are followed, such excessive pressure can be fairly characterized as unknown, as unusual, and as differing materially from the physical conditions ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract. We hold, therefore, that it constituted a changed condition of the second category within the meaning of Clause 4 of the contract.¹⁰

The Board finds that none of the other water or earth conditions encountered by appellant were changed conditions within the meaning of that clause. To the limited extent that the contract contained indications of the physical conditions at the site, the conditions actually encountered did not differ materially from those so indicated. To the extent that the contract did not attempt to indicate what would be found, the conditions actually encountered were, apart from the excessive hydrostatic pressure, neither unusual nor materially different from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

¹⁰ Because of this conclusion there is no need to examine the further question of whether the omission of the static water head measurements from the contract could be considered as bringing the excessive hydrostatic pressure within the first category.

*July 17, 1961***Was There a Change?**

A secondary ground for recovery advanced by appellant is that the action of the Government in requiring him to drive the wood bearing piles to depths below elevation 4325 constituted a change in the drawings or specifications of the contract within the meaning of Clause 3 of the General Provisions. Appellant contends that some of his difficulties were due to this action and should be compensated for under that clause.

The drawings contained a general profile of the pumping station on which appeared at elevation 4325 a line marked "Approx. Line of Penetration of Bearing Piling." The drawings also showed the pattern in which, and the distances from one another at which, the piles were to be spaced.

The driving of the bearing piles was the one item of the contract that was on a unit-price basis. The reason for this is made apparent by the specifications. Section 39 included the following provisions:

The Contractor shall furnish and drive all of the wood bearing piles under the pumphouse. Since it is difficult to predict the conditions that may be encountered when driving the piling, the contractor will be paid for the actual length of piling driven. The length of pile will be to cut off point. For bidding purposes, the lengths will be determined from lengths and placing pattern as shown on the drawings.

Section 43 contained the following provisions:

Bearing piling is required to support the pumphouse and apurtenant structures. After excavations for the various phases of the work is completed bearing piling shall be driven in accordance with the pattern and spacing shown on the drawings, unless otherwise directed by the Contracting Officer.

The subsurface conditions cannot be determined in advance of pile driving. The pattern and spacing determinations are based on the data obtained from the three test wells drilled in the pumphouse area. After test piles are driven conditions may be such that a change in pattern, spacing or depth, to which piles are driven may be ordered by the Contracting Officer.

* * * * *

The Contractor will be paid on the actual lineal feet of piling driven. For bidding purposes however, the bidder shall bid on the actual amounts taken from the drawings.

The position of appellant seems to be based on the propositions that the drawings fixed elevation 4325 as the approximate depth to which the piles were to be driven, and that the word "approximate" is sufficient to cover only slight or unimportant variations from that elevation. This line of reasoning, however, disregards entirely the provisions of sections 39 and 43 of the specifications, as well as the fact that payment for the driving of the piles was to be on a unit-price basis. The plain import of the contract as a whole is that the

piles were to be driven to such depths as the contracting officer might determine to be necessary in the light of the actual subsurface conditions, as revealed through the digging of the excavation and the driving of test piles, and that the contractor was to be compensated for driving the piles to these depths by payment of the unit price, stated in the contract, for each lineal foot below the cut-off point to which they were actually driven. Read in context, the reference to elevation 4325 merely denotes the depth on the basis of which the bid quantity of 6,700 lineal feet included in the contract was computed, not the depth to which the piles should be driven. In such a situation the word "approximate" is not limited to slight or unimportant variations, but covers those variations that are commensurate with the other provisions of the contract and with the exercise in good faith of the discretion reposed in the contracting officer by them.¹¹

The depths to which the bearing piles were driven ranged from about one to about 17.5 feet lower than elevation 4325. The evidence is to the effect that the subsurface conditions were such as to make the driving of the piles to these increased depths a reasonable means of insuring the stability of the pumphouse. It is also to the effect that the Government personnel acted in good faith in their determinations concerning the depths to which the piles should be driven. We hold, therefore, that the increased depths were authorized by sections 39 and 43 of the specifications, and did not amount to a change in the drawings or specifications within the meaning of Clause 3.

Scope of Equitable Adjustment

The remaining problem which needs to be solved in this appeal is that of identifying the items or sub-items of the claims as to which an equitable adjustment is due appellant. The excessive hydrostatic pressure was a substantial factor in causing a part, but only a part, of the expenses for which claim is made. What we must do is ascertain the causal relationship between the excessive pressure and the various classes of expense alleged to have been incurred, and on the basis of that relationship determine which items or sub-items are allowable.

The eight items that make up appellant's claims and their respective amounts are as follows:

1. Steel sheet piling-----	\$52,647.82
2. Excavation in cofferdam-----	24,314.70
3. Dewatering -----	¹² 262,340.91

¹¹ *Lipshitz & Cohen v. United States*, 269 U.S. 90 (1925); *Brawley v. United States*, 96 U.S. 168 (1877).

¹² The amount of this item as initially presented to the contracting officer was \$240,637.35. As so presented it included estimated costs for one of its sub-items, designated as open pumping. In the release on contract an additional sum of \$21,703.56 was reserved to cover the amount by which the alleged actual costs of the open pumping exceeded the estimated costs.

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4. Excess backfill.....	3,292.55
5. Gravel backfill.....	1,062.33
6. Sewer repair.....	612.93
7. River cleanup.....	1,273.70
8. Ramp removal.....	1,478.24
Total.....	\$347, 023. 18

Each of these items requires individual consideration.

1. Steel Sheet Piling

This item is for the costs of procuring the steel sheet piling, of constructing the cofferdam, and of performing related work.

The evidence is convincing that a contractor with experience in the handling of deep foundation excavations who had before him the information which was available to appellant before bidding would have determined that open-pit excavation, with open pumping, was not a practicable method of excavation for the pumphouse. Under any such procedure the large quantities of water, that were reasonably to be anticipated in the thick formation of sand underlying the soggy clay, would be able to flow freely towards the sides of the excavation and would be drawn into it by gravity, even in the absence of any unusual degree of hydrostatic pressure. In consequence, this formation of naturally incohesive material, together with the formations supported by it, could hardly have failed to slip and slough into the excavation on a prohibitively costly scale.

Practicable methods of excavation would have included the construction of a cofferdam composed of steel sheet piling, the consolidation of the area surrounding the site through the injection of bentonite or cement grout into the pervious formations, the digging around the site of a series of deep wells with gravel envelopes about them adequate for effective pumping, and possibly others. In view of the existence of such a variety of alternatives, the contract provisions under which the driving of sheet piling was left to the option of the contractor signify no more than that he was to be free to use any practicable method of controlling the movement of water and earth into the excavation. Indeed, their very presence in the contract would tend to suggest to a bidder the possibility that the Government engineers had appraised the situation as being one where construction of a cofferdam, while not necessarily the only procedure

that would be workable, probably was the procedure that a contractor would be most likely to use. If appellant read into the contract a connotation that the job was capable of being performed by the open-pit method, he was importing into it a thought that simply is not there, for that method is not even mentioned in the contract.¹³

Appellant appears to have arrived at his decision to use the open-pit method largely through erroneous analogies to other construction jobs he had performed in the Pocatello area. His experience was principally in the field of housing and commercial building, and the instant job was seemingly his first venture into a field of work requiring deep foundation excavations. His bid of \$326,645 was widely disparate from those of the other bidders, being \$156,084 less than that of the second lowest bidder, \$186,455 less than that of the third lowest, and \$231,445 less than that of the fourth. Such wide disparities have been held to be of probative value in a case like this.¹⁴ The bid was prepared without professional engineering assistance, and not until after the cofferdam had been constructed was such assistance obtained. From the evidence it is clear that appellant did not accurately evaluate the available information in concluding that an open-pit method, with open pumping, would suffice.

In all the circumstances the Board finds that the cofferdam expenses were not attributable to the changed condition, but were expenses that would have had to be incurred for performance of the contract work, either under the cofferdam method or under some alternative method, even if no changed conditions had been encountered. Hence, no equitable adjustment is allowable for them.

2. Excavation in Cofferdam

This item is for the costs of digging the excavation, as distinguished from the costs of dewatering it, over and above those that would have been incurred had the circumstances been such as would have admitted of the excavation being completed by the open-pit method. It also includes a sub-item for the costs of the final cleanup over and above those which would have been incurred under that method.

Recovery for these costs is sought, in general, on the ground that the construction of the cofferdam with its attendant bracing so restricted the available working space as to require the use of more expensive excavation procedures, such as the substitution of a clamshell excavator for the dragline excavator appellant had previously been using. It is also alleged that the excavation costs were augmented to an unde-

¹³ Cf. *Ivy H. Smith Company v. United States*, Ct. Cl. No. 273-58 (June 7, 1961).

¹⁴ *Great Lakes Dredge and Dock Company v. United States*, 119 Ct. Cl. 504, 558-59 (1951), cert. denied 342 U.S. 953 (1952).

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fined extent by the fact that the complex dewatering systems ultimately installed further restricted the available working space, by the fact that the volume of earth to be excavated was increased through the inflow of material into the excavation from beneath the cofferdam, and by the fact that some excavation was performed under water.

In the discussion of item 1 we have pointed out that the provision of a cofferdam was within the range of what should have been expected by appellant. It necessarily follows that the greater expense attendant upon excavating within a cofferdam, as compared with excavating in an open pit, should likewise have been expected. With respect to the other factors that are alleged to have augmented the excavation costs, the evidence affords no basis on which it could be determined how much or how little of such augmentation was due to the excessive hydrostatic pressure. Moreover, in establishing the scope of the equitable adjustment to be made for items 3, 4, 6 and 7 of the claims, we have attempted to make full allowance for the effect of that pressure in increasing appellant's expenses, whether for pumping, for excavation, or for other matters.

The Board finds that the costs included in item 2 were within the range of those which should have been anticipated in the light of the information as to subsurface conditions available to appellant when he bid. As they were not attributable to the changed condition, no equitable adjustment is allowable on account of them.

3. Dewatering

This item is for the costs of dewatering in excess of those which appellant considers would have been incurred if no changed condition had been encountered. The item has two principal components, one being for the installation and operation of the well point systems, the other being for open pumping through the use of surface pumps. The costs of the deep well that was abandoned soon after it had been sunk also appear to be included.

One basic issue presented by this item is whether appellant should have anticipated at the time of bidding that it would probably be necessary, even if a cofferdam were constructed, to perform under water the operations of excavating the stratum of sand, of driving the bearing piles, and of placing the concrete slab. The evidence is clear that continual pumping from within an evacuation which is surrounded or underlain by water-bearing formations will tend to open up channels for the flow of water through the formations, and thus stimulate an ever-larger and ever-faster flow into the excavation. Appellant had ample notice before bidding that the job site was surrounded and underlain by formations which were water-bearing, and

probably in large amounts. He also had in the terms of the contract itself a rather pointed warning that dewatering to the extent necessary for pouring the concrete slab in the dry might prove impractical. In the circumstances appellant's original plan of performing all operations in the dry through open pumping by surface pumps was ill-conceived from the start. Nevertheless, it was persisted in until long after the continued inflow of water had made manifest the impracticability of operations in the dry. We find that underwater operations should have been planned for from the beginning, and should have been started at about the same time that the cofferdam was completed.

A second basic issue is whether appellant should have anticipated at the time of bidding that it would probably be necessary to drive the sheet piling of the cofferdam deep enough to penetrate into the stratum of stiff clay. The significance of this issue arises from the fact that a substantial part of the water which entered the excavation reached it by passing through the gap of approximately four feet that existed between the bottom of the sheet piling, as actually driven, and the top of the stiff clay. There were two related reasons why water passed through this gap in large volume, one being the excessive hydrostatic pressure, the other being the excessive pumping from within the cofferdam. The excessive hydrostatic pressure constituted, as we have found, a changed condition. In its absence most of the excessive pumping probably would have been unnecessary if the operations had been performed under water, as outlined in the preceding paragraph. Thus, we come to the conclusion that an experienced contractor, when bidding, probably would not have anticipated the necessity for driving the sheet piling into the stiff clay, because he would not have expected the changed condition and he would have planned on doing the job by a method that did not involve excessive pumping from within the excavation.

Thirdly, there is the issue of whether appellant at the time of starting the cofferdam should have anticipated the need for driving the sheet piling into the stiff clay, in view of the volume of water already encountered. At this time the excessive hydrostatic pressure in the sand stratum had begun to reveal its presence, but there was little definite evidence pointing to a probability that the pressure was too great to admit of its being neutralized merely by allowing the water to rise within the cofferdam. The excessive hydrostatic pressure in the formations underlying the stiff clay was still entirely latent, as the latter had not as yet been penetrated. This was a most significant blank in the available information, for when the well points were installed they pumped for the most part from the formations below the

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stiff clay, rather than from the sand stratum. Then, too, the stiff clay itself turned out to be somewhat more pervious and less dense than might reasonably have been expected when the cofferdam was begun; for pumping from beneath it tended to reduce the inflow from the sands above it before any of the piles had been driven through it; and the bearing requisite for support of the pumphouse was secured only by driving the piles to depths below the 4325 elevation at which the Government engineers had anticipated that such bearing would probably be attained. Considering these circumstances, it would be an unjustifiable exercise of hindsight to conclude that appellant should have foreseen when the cofferdam was started, not only the need for underwater operations, but also the need for driving the sheet piling into the stiff clay. A contractor certainly ought not to be saddled with the burden of an engineering miscalculation as to the best method of overcoming a changed condition, suddenly encountered, unless the presence and extent of the condition are sufficiently manifest to make it evident, at the time of the miscalculation, that the method being chosen is an erroneous one.¹⁵

Taking these factors into account, the Board finds that the monetary impact of the changed condition upon appellant's dewatering costs may properly be measured by appellant's expenses for the three well point systems. It is, in our opinion, a sound inference from the evidence as a whole that the excessive hydrostatic pressure would have made it necessary for appellant either to use well points or to adopt some alternative method of intercepting water flows in the formations below the stiff clay, and possibly also in the sand stratum, even if he had planned from the beginning on a cofferdam and underwater operations, and had driven the sheet piling into the stiff clay. This latter step, if taken, would have materially reduced the amount of interceptive pumping required, but was a step the need for which became apparent only when the changed condition had fully disclosed its presence, after construction of the cofferdam.

The heavy expenses incident to the open pumping were, on the other hand, something that should have been expected in attempting to perform the job through the methods actually pursued. It is plain from the evidence that, considering only the factors known or knowable by appellant when bidding, the excavation could not have been kept dry through \$10,000 worth of open pumping, even with the assistance afforded by a cofferdam of the type that was installed. Moreover, appellant's ill-advised reliance on open pumping increased the costs of the job by increasing the volume of water to be handled and

¹⁵ See *Caribbean Construction Corporation, IBCA-90*, 64 I.D. 254, 271, 57-1 BCA par. 1315 (June 28, 1957).

of earth to be moved far beyond what they probably would have been if underwater operations had been timely begun. The deep well was an experiment that, in the light of the properties of the soil as disclosed in the excavation and through the well points, had little chance of success unless a gravel envelope were provided.

Conceivably, more exact information as to the underground conditions than the parties have been able to supply might put the Board in a position where it could make a more precise determination of the causal relationship between the excessive hydrostatic pressure and the various elements of the dewatering expenses. The Board, however, must take the record as it finds it. A studied evaluation of the evidence presented by the parties leads us to conclude that the portion of the dewatering costs properly attributable to the changed condition can be fairly and reasonably approximated on the basis of the expenses incurred in connection with the installation and operation of the three well point systems.¹⁶ These would include, of course, expenses related or incident to the use of those systems, such as, for example, repairs and adjustments necessitated by subsidence or other earth movements, and losses incurred through abandonment of unsalvageable well points or other parts of the systems. Dewatering expenses not related or incident to the well point systems, such as those for installation and operation of the surface pumps and of the deep well, either are within the range of the costs which should have been anticipated, or were due to appellant's errors in selecting and implementing the methods of operation to be pursued.¹⁷

We hold, therefore, that an equitable adjustment is allowable for the well point systems, but not for any of the other dewatering costs.

4. Excess Backfill

This item is for the costs of placing backfill to fill up the spaces created through the caving or subsidence of the area around the cofferdam as a result of the underground movement of earth into the excavation.

The Board finds that the changed condition was a substantial factor in causing these spaces. While the excessive pumping was also a substantial factor, a countervailing consideration is present in that installation of the cofferdam ought to have reduced the amount of backfill to be placed, as compared with the amount that would have been needed for the sloping-sided pit initially planned by appellant. All things considered, we hold that the equitable adjustment to be

¹⁶ See *Shepherd v. United States*, 125 Ct. Cl. 724, 737-40 (1953); *Caribbean Construction Corporation*, IBCA-90 (Supp.), 66 I.D. 834, 59-2 BCA par. 2322 (September 22, 1959).

¹⁷ Cf. *Corbetta Construction Company*, ASBCA No. 5045, 60-1 BCA par. 2613 (April 6, 1960).

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made for the changed condition should include the costs of placing so much of the backfill as exceeded the quantities that would have been needed for an open pit of the size contemplated by appellant's initial plans.¹⁸

5. Gravel Backfill

This item is for the costs of placing a layer of gravel backfill at the eastern end of the pumphouse.

The sheet piling was, as prescribed by the contract, set about five feet beyond the pumphouse walls. By a change order the contracting officer directed appellant to place gravel backfill between the piling and the walls, on the discharge side and both ends of the pumphouse, up to elevation 4357, which was the approximate elevation of the top of the piling. This instruction was given in the belief that gravel backfill would admit of better compaction and better drainage in these narrow spaces than would ordinary backfill. Appellant complied with the change order.

The instant controversy arises out of a proposal by appellant that a further change order be issued directing the placement of a layer of gravel backfill at the eastern end of the pumphouse above elevation 4357. The basis of the proposal was that the natural inflow of water into the area at the eastern end of the pumphouse was too great for good compaction of the backfill in that area unless additional drainage were afforded through the placing of a layer of gravel. Good compaction of the area in question was of considerable practical significance to appellant since the contract required him to install the pumping equipment, and since the large door at the eastern end of the pumphouse afforded the only opening through which such bulky and heavy equipment could be brought into the building. Upon receipt of appellant's proposal, an investigation of the area was made by Government engineers. They concluded that the earth along the eastern side of the excavation available for backfill purposes contained sufficient coarse material to provide adequate drainage without importing off-site gravel. Appellant accordingly was informed that, while he might place gravel backfill if he wished, it would have to be at his own expense. Notwithstanding this, appellant proceeded to import and place a layer of off-site gravel.

This item of the claims is not supportable. In the first place, the inflow of water observed in the area at the eastern end of the excavation above elevation 4357 appears to have come from formations

¹⁸In determining the amount of the backfill needed for such an open pit, account should be taken of the Board's ruling in IBCA-229 that the placing of backfill which would have to be re-excavated when the discharge works were constructed was not required by the contract.

above the stratum of soggy clay. As to such formations there is no reason for believing that either the volume of water or the hydrostatic pressure was in excess of the quantities that were reasonably to be expected as of the time of bidding. In the second place, even if it could be said that the water in this particular area amounted to a changed condition, the weight of the evidence is that the gravel content of the material available for backfill purposes at the site was sufficient to provide adequate drainage, so that the procurement and hauling in of off-site gravel was unnecessary. Finally, as the use of imported gravel was not required by any action of the Government and was authorized only with the proviso that appellant bear the costs, the provisions for changes in Clause 3 of the contract are also inapplicable. Hence, no equitable adjustment is allowable with respect to this item.

6. Sewer Repair

This item is for the costs of re-excavating and re-building portions of a sewer constructed under the contract.

An existing sewer crossed the site of the pumphouse. The contract required appellant to build a new sewer, intended to replace the old one, about 50 feet away from the site. Of necessity, and as expected by the Government, appellant constructed the new sewer before starting excavation for the pumphouse.

The caving and subsidence of earth around the excavation was so widespread that it resulted in undermining the support for the new sewer, causing breaks. Appellant, pursuant to instructions from the contracting officer, made the investigations and repairs requisite to locate and mend these breaks. The instant item is for the expenses incurred in so doing.

The evidence is persuasive that caving and subsidence would not have extended sufficiently far out from the pumphouse to affect the new sewer but for the excessive hydrostatic pressure encountered in the lower formations. Consequently, the Board finds that the changed condition was the cause of the breaks in the new sewer, and that an equitable adjustment is due appellant for the expenses incurred by him in locating and mending these breaks.¹⁹

7. River Cleanup

This item is for the costs of removing from the Portneuf River material sucked out of the excavation by appellant's pumps and discharged by them into the river.

The quantities of earth thus pumped into the river were sufficient to build up a substantial deposit in the vicinity of the planned location

¹⁹ Cf. *Hirsch v. United States*, 94 Ct. Cl. 602, 636-39 (1941).

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of the intake works for the pumphouse. The contract did not contemplate use of the river as a place for wasting excavated material.²⁰ Accordingly, the contracting officer required appellant to remove this deposit, thereby giving rise to the instant item of the claims.

The material pumped into the river consisted in part of earth initially present within the perimeter of the pumphouse site, and in part of earth carried into the excavation as a result of the excessive open pumping. Deposition of this material elsewhere than in the river was appellant's responsibility and, hence, the cost of its removal should be borne by him. The material pumped into the river also consisted in part of earth forced into the excavation by the excessive hydrostatic pressure. Deposition of this material in the river was an undesired, but necessary, consequence of the changed condition, and, hence, the cost of its removal should be borne by the Government.

It would be obviously impossible to so segregate the sources of the material deposited in the river as to make possible a precise mathematical division of the river cleanup expenses between appellant and the Government. There is, however, sufficient evidence to admit of a fair and reasonable approximation being made. Such approximation would, we find, be to the effect that one-half of these expenses was caused by the changed condition, and that the remaining one-half was appellant's responsibility.²¹

The Board holds, therefore, that the equitable adjustment to be made for the changed condition should include one-half of the river cleanup expenses.

8. Ramp Removal

This item is for the costs of removing a platform of logs and rock which appellant placed on the intake side of the pumphouse just outside the cofferdam, in order to provide a foundation for his crane and other heavy equipment. Upon completion of the work the contracting officer required that this platform be removed since it occupied a part of the site of the forebay.²²

The Board finds that the excessive hydrostatic pressure was not a substantial factor in creating the need for construction of the ramp. To the contrary, it appears from the evidence that appellant probably would have needed a ramp in order to perform the work even if the physical conditions at the site had been no worse than those which

²⁰ Section 40 of the specifications provided that "waste or spoil banks shall be roughly leveled so as not to appear unsightly and placed at such locations as designated by the Contracting Officer."

²¹ *Of. Chalender v. United States*, 127 Ct. Cl. 557, 564-66 (1954).

²² Section 23 of the specifications provided that "upon completion of the work, the Contractor shall remove all equipment and unused materials provided for the work and remove all dirt and rubbish and put the premises in a neat and clean condition."

should have been anticipated. Moreover, evidence is lacking to show that it was necessary to place the ramp in the forebay area, rather than at some other location where its presence would not have interfered with future construction, and where it could have been buried beneath the backfill instead of being removed.

The Board holds, therefore, that no equitable adjustment is allowable for the ramp removal expenses.

Remand

At the hearing counsel for both parties stipulated that they wished the Board to determine at this time only the issue of liability; that if the Board found liability to exist appellant would accord the Government an opportunity to examine his records pertaining to the costs of the work in controversy; and that should additional testimony concerning the amount of such costs be deemed necessary it would be taken by deposition.

The Board, accordingly, remands IBCA-223 to the contracting officer for ascertainment and establishment of the amount to be allowed as an equitable adjustment on account of the items as to which the Board has found liability to exist, that is, items 3, 4, 6 and 7. The sum to be allowed with respect to each of these items should reflect the actual and reasonable costs of those parts of the construction operations as to which the Board has found an equitable adjustment to be due, and should include appropriate allowances for overhead and profit, but may not exceed the amount reserved for such item in the release on contract.

If, after appellant's records have been examined pursuant to the stipulation, the contracting officer and appellant are unable to agree upon the amount of the equitable adjustment to be made with respect to items 3, 4, 6 and 7, the contracting officer should determine the amount and issue findings of fact showing the basis for his determination. If appellant is dissatisfied with the contracting officer's determination and findings he may, within 30 days from the receipt thereof, take an appeal to the Board under the "disputes" clause of the contract. If such a second appeal is taken it will be decided on the present record, supplemented by such further evidence as either party may present in deposition form pursuant to the stipulation.

IBCA-229

The issue presented by this appeal is whether the contract required the placing of backfill in the portion of the excavation where the discharge works were to be situated.

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The specifications defined backfill as "excavation refill required to be placed around a structure after the structure has been completed," and described how it should be compacted, but did not state where it was to be placed. Drawing 0020 contained the direction "Level To Elev. 4380.0," together with arrows pointing generally towards the entire area surrounding the pumphouse, exclusive of the forebay.²³

When the time came to complete the backfill, the contracting officer instructed appellant not to place further backfill on the discharge side of the pumphouse.²⁴ The reason for this instruction was that if the excavation on the discharge side were filled, it would have to be dug out again before the discharge works, which did not form a part of the contract, could be constructed. Conformably to the instruction, appellant refrained from placing further backfill on the discharge side.

The contracting officer subsequently ruled that the Government was entitled to deduct \$750.00 from the contract price because of these events. His ruling appears to have been predicated on the view that the instruction not to place the backfill was a downward change in the quantity of the contract work and, therefore, entitled the Government under Clause 3 to a downward equitable adjustment in the contract price. The ruling is appealed on the ground that there was no requirement in the contract that backfill be placed in the unfilled area and, hence, there was no change.

In order to determine the proper application of the direction "Level To Elev. 4380.0," it is necessary to consider the context in which it appears. While the contract did not provide for construction of either the forebay through which water from the Portneuf River would be drawn into the pump inlets, or the pipelines through which the pumped water would be discharged into irrigation canals on the bench above the pumphouse, the specifications and drawings, nevertheless, contained numerous references to both. Among other things, they revealed that three large-diameter discharge pipes, supported by a thrust block, were to be placed in the area immediately adjacent to the discharge side of the pumphouse at depths well below elevation 4380. The approximate location of these pipes was shown on drawing 0020. One reason for the various references to the intake and discharge works was that the specifications and drawings had been prepared initially for an earlier invitation which required construction of these works as a part of the pumphouse job, but under which no contract

²³ Drawing 0001 contained the notation "Elev. 4380.0" with arrows pointing towards the same area. This notation is equivocal in that it could refer to the natural ground level, rather than to the finished grade. If it refers to the latter, the analysis hereinafter made of the more specific direction in drawing 0020 is equally applicable to it.

²⁴ The gravel backfill below elevation 4357 mentioned in the discussion of Item 5 of IBCA-223 had been previously placed and was not affected by this instruction.

had been awarded because all the bids received were deemed excessive.

Considerable pains were taken in the contract to make clear the intent that neither the intake works nor the discharge works were to be covered by its provisions. With respect to the latter, the contractor's responsibility was to include the installation of the three frustrums leading from the pumps to the discharge pipes, but was to extend no further. These frustrums terminated about two feet outside the wall of the pumphouse. Section 2 of the specifications explained the principal differences between the work to be done and that which would have been required by the specifications of the earlier invitation, and then went on to say:

Note: Reference in these specifications to any of the work which was included in the previous Specifications, but which has now been excluded, shall be disregarded if it does not apply to the present specifications.

Other provisions of the contract expressed a like intent.

Viewed from a practical standpoint, the backfill in the portion of the excavation where the discharge works were to be situated would seem to be more closely related, both physically and functionally, to the discharge pipes than to the pumphouse itself. The backfill would not merely abut the pumphouse, but would also cover and surround the pipes once they were laid. Hence, there would seem to be more reason for treating it as an incident to the discharge works than as an incident to the pumphouse.

It was, moreover, self-evident when the contract was let that the Government would proceed to have both the forebay and the discharge pipes constructed as soon as practicable, for without them the pumphouse and its equipment would be useless. Backfilling of the discharge side of the pumphouse to elevation 4380 before the discharge pipes and their supporting thrust block were set would have been feasible, but would have necessitated the subsequent re-excavation of the backfilled area, at the cost of the Government, in order to set these essential components. Thus, if the contract be read as meaning that the discharge side was to be backfilled to elevation 4380, it would be necessary to conclude that the Government intended to have appellant perform work that, far from being a benefit to anyone, would have made the building of the discharge works more expensive for the Government. It is, of course, axiomatic that an interpretation of a contract which leads to a reasonable result is to be preferred over one that does not.²⁵

In the light of the general scheme of the contract provisions, their history, such specific provisions as the "Note" to section 2, and these

²⁵ See *John A. Johnson Contracting Corporation v. United States*, 132 Ct. Cl. 645, 653-55 (1955).

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practical factors, we construe the direction "Level to Elev. 4380.0" in drawing 0020 as describing the situation that was to exist after all the works indicated on that drawing, including the pipelines, had been completed. In the light of these same considerations, we construe the placement of the backfill here in question as being work that was excluded from the specifications of the contract, and as to which such direction was, therefore, to be disregarded. It follows that the contract did not require appellant to place such backfill, and that the non-placement thereof did not entitle the Government to a reduction in the contract price.

Conclusion

In IBCA-223 the appeal is sustained with respect to items 3, 4, 6 and 7 to the extent indicated above and is otherwise disallowed, and the case is remanded to the contracting officer for further proceedings consistent with the findings made and conclusions reached in this decision. In IBCA-229 the appeal is sustained in the amount of \$750.00.

HERBERT J. SLAUGHTER, *Deputy Chairman.*

I concur:

PAUL H. GANTT, *Chairman.*

THOMAS M. DURSTON, *Member.*

UNITED STATES v. CLYDE RAYMOND ALTMAN AND CHARLES M. RUSSELL

A-28478

Decided July 17, 1961

Mining Claims: Contests—Mining Claims: Determination of Validity— Mining Claims: Patent

Where a contest is brought against a mining claim on the ground of lack of discovery, following the filing of an application for a mineral patent, the burden of proof is upon the contestee to show by a preponderance of the evidence that a discovery has been made and where the contestee meets the evidence produced by the Government with evidence of equal weight only, he is not entitled to receive a mineral patent.

Mining Claims: Discovery—Mining Claims: Patent

Where an applicant for a mineral patent has shown no more than that there are bodies of low-grade minerals on his claims and has not shown that there is a reasonable expectation that the minerals exposed on the claims lead to minerals of greater value or that they exist in quantities which would cause a prudent man to expend his time and money in developing the claims, the applicant is not entitled to a mineral patent.

Mining Claims: Discovery

A valid discovery under the mining laws requires more than the finding of mineral indications which would not warrant development work but only further exploratory work to determine if a valuable mineral deposit exists in the claim.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

This is an appeal to the Secretary of the Interior by Clyde Raymond Altman and Charles M. Russell from a decision dated March 18, 1960, by the Acting Director, Bureau of Land Management, reversing a decision of a hearing examiner holding that the Pocahontas Nos. 1 and 2 lode mining claims, situated in secs. 17, 19, and 20, T. 20 S., R. 15 W., N.M.P.M., New Mexico, within the Gila National Forest, are valid claims and that the locators are entitled to have patent issued to them pursuant to their application therefor. The Acting Director held that a discovery of valuable mineral deposits within the limits of the claims had not been made, rejected their patent application (New Mexico 014768), and held that the claims are null and void.

The appellants contend that the hearing examiner rather than the Acting Director properly evaluated the evidence presented at the hearing on the charges brought against the claims by the United States Forest Service, Department of Agriculture, and that the Acting Director applied a stricter test than the prudent man test in determining that no discovery had been made on the claims.

The evidence presented at the hearing, summarized in the decisions of both the hearing examiner and the Acting Director, has been carefully reviewed. That evidence will not support a finding that a discovery of minerals sufficient to validate claims to the land under the mining laws (30 U.S.C., 1958 ed., sec. 22 *et seq.*) has been made. The most that can be said for the showing made by the claimants is that they have found minerals showing slight values in cuts on the claims. They presented nothing to indicate that the minerals exposed by their exploration work extended for any distance in any direction and nothing upon which a reasonable expectation might be based that more extensive mineral values would be found at greater depths. Both experts who testified for the contestees stated that more exploration work should be done on the claims to ascertain whether there is secondary enrichment. On the other hand, the Government produced testimony that there is nothing to indicate any continuous mineralization between the various bodies of low grade ore disclosed within the limits of the claims.

A discovery, to satisfy the requirements of the law, means more than a showing of isolated bits of mineral, not connected with or

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leading to substantial values. *United States v. Frank J. Miller*, 59 I.D. 446 (1947). The time-honored test to be applied in determining whether a discovery has been made on a lode mining claim is that set forth in *Jefferson-Montana Copper Mines Company*, 41 L.D. 320 (1912), cited by the Acting Director. While the exploration work done on the claims does show the presence of minerals in vein form, it also shows that the value of the minerals is almost nil and it can not be said that these claims measure up to the test set forth in the *Jefferson-Montana* case.

The presence of low-value minerals in a lode mining claim which a prudent man would not be justified in expending time and money to develop with a reasonable prospect of success in developing a paying mine is not sufficient to constitute a discovery under the mining laws. *United States vs. Harold Ahlstrom et al.*, A-28490 (December 16, 1960). Further, the mere hope or expectation, based upon a general belief that values will increase at depth, is not sufficient to validate a claim. *United States v. Laura Duvall and Oliford F. Russell*, 65 I.D. 458 (1958). Nor is it enough that the showing might warrant further exploration in hopes of finding a valuable deposit. *United States v. Harold Ahlstrom et al.*, *supra*.

The Acting Director's decision does not appear to be susceptible to the construction which the contestees attribute to it, that is, that the Acting Director has added to the prudent man test the necessity for showing that the deposit is one which is "capable or probably capable of sustaining a paying mining operation." The Acting Director said merely that if such a showing were made "the mining claimants have indeed demonstrated a valuable deposit of mineral having value for mining purposes." He did not say that anything less than such a showing would defeat a claim.

Nor is the Acting Director's statement that while a prudent man might be justified in further exploration work on these claims he would not be justified in further expenditure of his time and money with a reasonable prospect of success in developing a paying mine an enlargement of the prudent man rule. There is, of course, a distinct difference between exploration and discovery under the mining laws. Exploration work is that which is done prior to a discovery in an effort to determine whether the land contains valuable minerals. Where minerals are found it is often necessary to do further exploratory work to determine whether those minerals have value and, where the minerals found are of low value, there must be more exploration work to determine whether those low-value minerals exist in such quantities that there is a reasonable prospect of success in developing a paying mine. It is only when the exploratory work shows this that

it can be said that a prudent man would be justified in going ahead with his development work and that a discovery has been made. It would appear that what the Acting Director was saying here was that while the land might be worthy of more exploratory work the claims had not been explored to such a point that discovery had been achieved under the prudent man rule.

Thus it must be held that the Acting Director applied the correct standard in his determination with respect to discovery and that, no discovery having been shown to have been made within the limits of the Pocahontas Nos. 1 and 2 lode mining claims, he was correct in declaring the claims to be null and void. *United States v. Kenneth F. and George A. Carlile*, 67 I.D. 417 (1960).

The hearing examiner's evaluation of the evidence was obviously premised on a misconception as to who had the burden of proof on the issue of whether a discovery had been made within the limits of each claim. He stated, properly, that the Government, which brought the charge of no discovery following the appellant's application for a mineral patent, had the burden of making out a *prima facie* case of no discovery and that it was then incumbent upon the contestees to establish as a fact that a valid discovery had been made. However, he then stated that the burden of proof rested with the Government throughout the contest and that the contestees need only meet the evidence presented by the Government with evidence of equal weight. In other words, he held that the Government could prevail in the contest only if it proved the charge by a preponderance of the evidence. In this, he found that the Government had failed.

Such is not the law with respect to the proof required to establish the validity of a mining claim. The law is, as recently affirmed by the United States Court of Appeals for the District of Columbia in *Foster v. Seaton*, 271 F. 2d 836 (1959), that when the Government contests a mining claim it bears only the burden of going forward with sufficient evidence to establish a *prima facie* case, and that the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid. The court found that the Department had been applying this standard for a number of years.

While a contest is subject to dismissal where the Government fails to make out a *prima facie* case, nevertheless a mining claimant must have made a discovery within the limits of his claim in order to gain any right in the land as against the United States and where such a claimant applies for a mineral patent he must submit proof of discovery to be entitled to a patent. This is so whether or not the Government produces any evidence relating to the question of discovery. Cf. *United States v. C. F. Smith*, 66 I.D. 169 (1959).

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Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director is affirmed.

EDWARD W. FISHER,
Deputy Solicitor.

**APPEAL OF MORRISON-KNUDSEN COMPANY, INC., HENRY J. KAISER
COMPANY, AND F & S CONTRACTING COMPANY**

IBCA-266

Decided July 18, 1961

Contracts: Appeals

Where no reason appears for any objection to a stipulation disposing by agreement a changed conditions claim, the Board will accept the stipulation to the extent reflected by the agreement, sustain the appeal to that extent, and remand it to the contracting officer for appropriate action.

Rules of Practice: Appeals: Dismissal

The Board will dismiss an appeal with prejudice where the parties agree to that effect by stipulation.

BOARD OF CONTRACT APPEALS

On July 13, 1961, the following stipulation dated July 10, 1961, was filed with the Board:

The Government, represented by Grant Bloodgood, Assistant Commissioner and Chief Engineer of the Bureau of Reclamation who is the contracting officer for the contract involved in this appeal and Palmer King, Department Counsel, and the appellant, represented by Morrison-Knudsen Company, Inc., the sponsoring member of the joint venture performing the work under the contract involved in this appeal and Robert M. McLeod, counsel for appellant, do jointly stipulate and agree as follows:

1. It is stipulated that appellant's timely appeal places in issue the contracting officer's Findings of Fact and Decision dated November 16, 1960 as more fully identified in the heading hereof, with regard to four claims submitted by appellant as set forth in detail in said Findings of Fact and Decision and attachments thereto.

2. It is stipulated with regard to appellant's Claims Nos. 1, 2, and 4 as identified more fully in the contracting officer's Findings of Fact and Decision dated November 16, 1960 and exhibits attached thereto that appellant shall have no recovery pursuant to said claims, and that this appeal with regard to said Claims Nos. 1, 2, and 4 shall be dismissed with prejudice.

3. With regard to appellant's Claim No. 3, which claim is based upon the failure of the Zone 1 type materials to drain and cure within a reasonable time after irrigation, it is stipulated that said material did, in fact, fail to drain and cure in borrow within a reasonable time after irrigation, and that the properties of the material and the physical conditions resulting in the failure of the said Zone 1 material to drain and cure within a reasonable time constituted unknown physical conditions at the site of the work of an unusual nature differing

materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract within the meaning of Article 4 of the contract. It is further stipulated that as a result of the failure of said material to drain and cure within a reasonable time after irrigation appellant has experienced and is experiencing increased costs as a result of the increased difficulty of performing borrow excavation due to excessively wet areas and excessively wet material in the borrow pits, as a result of increased difficulty of handling and placing in embankment material containing excessive moisture, and as a result of the necessity, from time to time, of removing, replacing and recompacting material on the fill rejected because of excessive moisture.

4. It is further stipulated that the equitable adjustment to which appellant is entitled by reason of the encountering of said changed conditions as described in the preceding paragraph shall be an allowance of additional compensation in the amount of four cents per cubic yard for each cubic yard of Zone 1 material excavated from borrow and placed in Zone 1 of the dam embankment, and that the quantity of said material for which adjustment is to be allowed shall be the quantity as determined in borrow. It is further stipulated by and between the parties that the contracting officer has determined that the quantity of Zone 1 material required to be excavated from borrow for placement in Zone 1 of the dam is 12,503,788 cubic yards, and the appellant accepts said quantity as the full quantity for which the Government shall be obligated to make additional payment as above provided.

5. This stipulation shall become effective upon its approval by the Interior Board of Contract Appeals.

6. In the event, for any reason, this stipulation should fail to become operative and binding upon the parties, then it shall be of no force or effect whatsoever, either as an admission by either party or otherwise, and the rights of the parties shall be the same as though this document had never been executed.

The Board has considered the stipulation. Since there appears to be no reason requiring the objection of the Board, the Board approves the stipulation, and orders the following action in accordance therewith:

1. The appeal concerning Claims Nos. 1, 2, and 4, which are fully identified in paragraph 2 of the above stipulation, is hereby dismissed with prejudice.

2. The appeal concerning Claim No. 3 is sustained to the extent reflected by the agreement of the parties in paragraphs 3 and 4 of the above stipulation. Consequently, Claim No. 3 is remanded to the contracting officer for appropriate action.

3. It is hereby found that the appeal is concluded and should be stricken from the docket.*

**Monarch Lumber Company, IBCA-217, June 21, 1960, 67 I.D. 265, 60-2 BCA par. 2690.*

It is so ordered.

PAUL H. GANTI, *Chairman.*

THOMAS M. DURSTON, *Member.*

APPEAL OF WELDFAB, INCORPORATED

IBCA-268 *Decided August 11, 1961*

Contracts: Changes and Extras—Contracts: Additional Compensation— Contracts: Drawings

Where a contractor incurs standby costs prior to obtaining clarifying instructions from the Government as to ambiguities and discrepancies in Government drawings, such expenses are not allowable under the Changes clause (October 1957 Edition of Standard Form 32) which provides for equitable adjustment concerning unchanged work as well as changed work.

Contracts: Delays of Contractor—Rules of Practice: Evidence

Where a contractor alleges that it is entitled to further extension of time for excusable delay in addition to period allowed by contracting officer, but fails to sustain its burden of proof by submission of evidence to support its allegations, the findings of the contracting officer will be presumed to be correct.

BOARD OF CONTRACT APPEALS

This appeal was taken from the Findings of Fact and Decision of the contracting officer of January 10, 1961 (erroneously dated 1960), denying the appellant's claims for extension of time and additional compensation in the sum of \$3,158.00 for delay, both caused allegedly by ambiguities, omissions and discrepancies in Government drawings. The Notice of Appeal was also erroneously dated January 20, 1960, and was sent by appellant directly to the Board of Contract Appeals, being received January 31, 1961. Hence, the appeal was timely. On April 11, 1961, the Board denied a motion by Department Counsel to dismiss the appeal.¹

Contract No. 14-09-060-2043 was awarded to appellant on April 20, 1960, after formally advertised bidding. It was executed on Standard Form 33 and contained Standard Form 32, October 1957 Edition (Supply Contract). Items 1 and 2 of the contract required two lots of aluminum panels to be delivered within 60 days after receipt by the contractor of the notice of award, at prices of \$12,289.45 and \$4,387.11, respectively. The urgency of the delivery requirements was spelled out in the invitation for bids, and liquidated damages of \$25.00 per day were chargeable for failure to deliver the materials, or any part thereof, within the time specified.

Notice of award was received by Weldfab on May 4, 1960, thus making July 3, 1960 the required delivery date. On June 3 and 10,

¹ *Weldfab, Inc.*, IBCA-268 (April 11, 1961), 68 I.D. 107. The Board held, quoting from the headnote: "Board will not dismiss appeal in situations where action of appellant does not indicate an intention to abandon appeal, and issues are determinable from notice of appeal, findings of fact and decision of contracting officer, claims of appellant and evidence submitted by it prior to contracting officer's decision."

1960, a Weldfab official telephoned the Helium Activity, requesting clarification as to about 12 minor discrepancies or ambiguities in the two drawings concerning various types of panels. Also, on June 10, 1960, the contractor asked for a drawing dimension, by telegraph. The clarifications were furnished by telephone and in a telegram of June 13, 1960. The telephone clarifications were confirmed by the Helium Activity in a letter of June 20, 1960. A total of 64 panels were affected by the clarifications, out of more than 1,600 panels required by the contract.

The deliveries were substantially completed on July 27, 1960. In his findings the contracting officer extended the completion date to July 14, 1960, for causes beyond the control of the contractor, consisting of delay of 11 days between June 3, 1960 and June 13, 1960, inclusive, caused by the necessity of obtaining such clarifications of the drawings.

The contractor entered its claim on the basis that 344 hours of working time were wasted while obtaining the clarifications, and that the period for performance should be extended to the date of actual delivery, July 27, 1960. The total cost of such idle time of 344 hours at \$3.00 per hour for direct labor was computed with 150% overhead, 10% G&A and 10% profit, resulting in the claim of \$3,158.00.

Claim For Further Extension of Time

Unfortunately for the contractor, it has not shown how its claimed delay of 344 working hours exceeds the 11 days allowed by the contracting officer. No statement has been submitted by appellant concerning the number of workmen involved, or how the 344 hours should be distributed. In the absence of proof concerning the period of claimed excusable delay, the Board is unable to determine it.² The Board reiterates its holding in *Duncan Construction Company*:³

In an appeal attacking the validity of a finding of fact or decision by a contracting officer, not patently erroneous, it is incumbent upon a contractor who advances a claim against the Government that was denied by such finding or decision to come forward with evidence showing error therein, and in the absence of such evidence this Board cannot properly overrule the decision of the contracting officer. * * *

The burden of this appeal is upon the contractor's shoulders, and that burden calls for evidence on the contractor's side to show that the action taken by the contracting officer was erroneous; and it is not sufficient merely for the contractor to say that the action was not proper, for such a contention should be supported by proof giving some explanation of just why it was an error. In the

² In its telegram of March 30, 1961, to Department Counsel, appellant states in part: " * * Weldfab feels that sufficient evidence has been forwarded to your office for evaluation of our claim. We do not deem it necessary to appoint an attorney regarding this matter. We would appreciate your office giving us a fair evaluation of the evidence submitted and will abide by its finding."

³ IBCA-91 (April 2, 1958), 65 I.D. 135, 138, 58-1 BCA par. 1675.

absence of such proof the Board must accept the record, together with any testimony submitted by the Government, as being correct, unless it, on its face, shows error or that it is unbelievable.

On the record, the appellant has failed to sustain its burden of proof, by a preponderance of the evidence, that the findings of the contracting officer were erroneous; and, on their face, there is no apparent error in such findings. Therefore, the Board must accept such findings as being correct concerning the period of excusable delay.⁴

Accordingly, appellant's claim for further extension of time is hereby denied.

Claim for Additional Compensation

In its letter of November 21, 1960, submitting details of its claim, appellant says:

* * * To explain further—our additional 344 direct hours were consumed as follows:

RE: PARA. 1 & 2—When it came to the attention of the writer that the existing drawings supplied by the Government were in error, it became necessary to stop production on all items and re-submit these drawings to our Engineering Department to clarify for the shop where these discrepancies existed and how many. You will recall there were approximately 1400 details involved. This is a long involved process resulting in many Engineering man-hours to clarify these drawings. You will also recall that this resulted in several long distance telephone calls to get clarification.

The method of fabricating these parts was standard equipment using stripped punches. Had we not encountered the discrepancies for the problem maintaining the 3" C/1 requirement we would have been able to fabricate this job in our original estimated time. As it turned out, in order to produce acceptable end products, it became necessary to fabricate many of these detail parts individually resulting in additional shop hours. Although your telephone calls did clarify the situation, you must remember that each time a discrepancy was noted, work stoppage existed on both man and machine.

We are quite sure that men in your organization who are familiar with this type of fabrication must realize what these interruptions can do to production cost wise.

The first paragraph in the foregoing quotation refers to "* * * Engineering man-hours to clarify these drawings." However, appellant does not base its claim on such engineering man-hours, unless they are included in the claim of 344 hours of direct labor at \$3.00 per hour. Moreover, it appears that the appellant's Engineering Department was

⁴ *Flora Construction Company*, IBCA-180 (June 30, 1961); *Duncan Construction Company*, IBCA-197 (February 1, 1961), 61 BCA par. 2932, 3 Govt. Contr. par. 180 (r); *General Excavating Company*, IBCA-188 (September 21, 1960), 67 I.D. 344, 60-2 BCA par. 2771, 2 Govt. Contr. par. 539; *Arizona Plumbing and Heating Company*, IBCA-123 (August 18, 1960), 60-2 BCA par. 2702, 2 Govt. Contr. par. 488; *Duncan Construction Company*, fn. 3, *supra*; *AAA Construction Company*, IBCA-55 (November 26, 1957), 64 I.D. 440-42, 57-2 BCA par. 1510; *Central Wrecking Corporation*, IBCA-69 (March 29, 1957), 64 I.D. 145, 165-66, 57-1 BCA par. 1209; *Conn Structures*, ASBCA No. 5072, 5239 (February 29, 1960), 60-1 BCA par. 2551, 2 Govt. Contr. par. 253.

merely performing its normal function, which had not been completed on an earlier examination. Hence, it was necessary to resubmit the drawings to the Engineering Department after the discrepancies had been questioned elsewhere, presumably in the "shop." No doubt this partly accounts for the expiration of one-half of the contract performance period before appellant requested clarification from the Helium Activity.

The Board finds that all of the ambiguities and discrepancies complained of were of a minor and trivial nature. Hence, the Board concludes that they could have had little or no effect on appellant's bid. Nor is it claimed by appellant that its bid price was affected thereby. Several of the questions asked by Weldfab and the answers supplied by the Helium Activity are set forth, *infra*, as they appear in the Findings of Fact and Decision of the contracting officer, and in the confirming letter of June 20, 1960. Only one of the discrepancies was actually a drafting error.

This involved a drawing which gave the width of Panel No. 56 as 4' 4-1/2" at the top and as 4' 4-3/8" at the bottom. The contractor was informed that the latter dimension was correct for both top and bottom widths.

Other typical questions involved such minutiae as:

Question: Does Note #1 apply to 1 or 6 panels?

Answer: Note #1 applies to 6 panels as per drawing.

Question: Give details of stiffener.

Answer: Use Detail C as per drawing.

(As to all other panels requiring stiffeners, the drawing contained a reference to "Detail C." As to this particular panel (No. 9), the reference was inadvertently omitted.)

Question: Detail of overlap strip—right side.

Answer: Use Detail B, same as left side.

("Detail B" showed typical dimensions applicable to both sides. This clarification was the same answer given as to 2 other panels.)

Question: Size of hole, bottom center.

Answer: 4-inch diameter.

(The hole shown on the drawing was to scale, as were all other representations on the drawings.)

Question: Location of 5/16-inch hole from top and bottom edge.

Answer: 1/2-inch from edges.

During the period of these clarifications, the appellant on several occasions requested a deviation, as indicated in the second paragraph of its letter of November 21, 1960, quoted, *supra*. The drawings for lap strips attached to panels required rivets to be on 3-inch centers with 1-inch maximum distance from the edges of the ends of the

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lap strips. The appellant wished to deviate from the 1-inch requirement because, as it says in that paragraph, it planned to use strip-punches. Refusal by the Helium Activity to allow the deviation made it necessary for the contractor-appellant to use individual fabrication methods. Had the deviation been granted, appellant says, it would have been able to complete the job in "our original estimated time." Thus it appears that at least some part of the delay was attributable to the requirement by the Helium Activity that the appellant comply with the drawings.

We conclude from appellant's statement :

Although your telephone calls did clarify the situation, you must remember that each time a discrepancy was noted, work stoppage existed on both man and machine.

that the appellant's monetary claim is one for standby expense of direct labor plus overhead, etc., incurred during the period of obtaining the clarifications it requested.

Assuming that these clarifications resulted in constructive change orders, the Board must look to Clause 2, "Changes" for guidance as to whether such expense may be allowed.

The Changes clause of the 1957 Edition of Form 32 provides for an equitable adjustment of the contract price or delivery schedule or both:

* * * If any such change causes an increase or decrease in the cost of, or the time required for, the performance of any part of the work under this contract, *whether changed or not changed by any such order*, * * * . (Emphasis added.)

In the 1949 edition of Form 32, as well as previously, the standard Changes clauses did not provide for an equitable adjustment of the contract price as to work which was not changed by the change order. Frequently, however, such unchanged work was seriously, although indirectly, affected by delay, lengthening of the performance time and pushing it into higher cost periods, and similar additional expense.

These circumstances are reflected in a long and still continuing series of court decisions and appeal board cases. To retrace briefly the history of this line of cases, the United States Supreme Court decided eighty-four years ago⁵ that costs of Government-caused delay or additional expense as to unchanged work, resulting from the *issuance* of change orders, was not even recoverable under the theory of breach of contract, in the absence of an express provision in the contract creating an actual obligation on the part of the Government not to delay

⁵ *Chouteau v. United States*, 95 U.S. 61 (1877).

performance of work. The Supreme Court held that the contractor was entitled only to an extension of time for performance.⁶

The Court of Claims had distinguished these rulings of the Supreme Court by holding that there is "an implied obligation on the part of the Government not to willfully or negligently interfere with the contractor in the performance of his contract," the breach of which obligation would allow an action to lie.⁷ It must be noted that the Supreme Court decisions did not involve the aspect of unreasonableness of a delay which occurred *prior to the issuance* of a change order.⁸

It has long been well settled that until the adoption of the 1957 Edition of Standard Form 32, any claim for Government—caused delay (of any nature), not clearly cognizable under some other clause of the contract, was likewise not compensable under the Changes clause (unless directly caused by changed work), but constituted a claim for breach of contract. As such it was neither within the power of the contracting officer to adjust, nor within the jurisdiction of contract appeal boards to decide.⁹

What, then, is the effect of the new Changes clause in the 1957 Edition of Standard Form 32, as far as the present controversy is concerned? Apparently, the only reported decision of an appeal board involving the 1957 clause is *Craig Instrument Corporation*.¹⁰ However, as pointed out in the editorial discussion of the case in "*The Government Contractor*," the Armed Services Board of Contract Appeals did not consider in its opinion the differences in the 1957 Changes clause with respect to "unchanged work" as compared with the clause in the 1949 Edition.

In the instant appeal, it is clear that appellant's claim is for standby expenses which were incurred *prior* to the issuance of the clarifying instructions which we are assuming could be treated as constructive change orders. There is no claim or assertion that any additional costs were imposed *by* these instructions. Presumably, the standby period could have delayed the progress of the unchanged work as

⁶ *United States v. Foley*, 329 U.S. 64 (1946); *United States v. Rice*, 317 U.S. 61 (1942); *Crook v. United States*, 270 U.S. 4 (1926); *Chouteau v. United States*, fn. 5 *supra*.

⁷ *Peter Kiewit Sons Co. v. United States*, 138 Ct. Cl. 668, 674-75, 151 F. Supp. 726, 731 (1957); *F. H. McGraw & Co. v. United States*, 131 Ct. Cl. 501, 130 F. Supp. 394 (1955).

⁸ See Speck, *Delays-Damages on Government Contracts: Constructive Conditions and Administrative Remedies*, 26 Geo. Wash. L. Rev. 505, 518-46 (April 1958); see also Dept. of Army Pamphlet No. 715-50-1, "Procurement Legal Service," pp. 145-47 (January 1957).

⁹ *Allied Contractors, Inc.*, IBCA-265 (May 16, 1961); *Central Florida Construction Company*, IBCA-246 (January 5, 1961), 61-1 BCA par. 2903, 3 Govt. Contr. par. 40; *Platte Valley Construction Company*, IBCA-168 (August 28, 1958), 58-2 BCA par. 1892; *L. L. Hall Construction Company*, ASBCA No. 6961 (May 17, 1961), 61-1 BCA par. 3044, and cases cited therein.

¹⁰ ASBCA No. 6385 (December 5, 1960), 61-1 BCA par. 2875, 3 Govt. Contr. par. 170 (holding that delay by the Government in approving pre-production samples was not a change within the meaning of the Changes clause).

well as the work directly involved in the discrepancies or ambiguities.

The Board is of the opinion that the new provisions of the Changes clause, making the equitable adjustment applicable to unchanged work as well as to changed work, were never intended to afford relief by way of an equitable adjustment in a case such as the present one, for costs of delay occurring *before* the change order (or constructive change order) is issued.¹¹ This interpretation has been applied without exception, we believe, to the Changes clause as it existed prior to 1957.¹²

The 1957 Edition of the Changes clause has not altered the words which are determinative of the application of the equitable adjustment provisions, namely:

* * * If any such change *causes* an increase or decrease * * *. (Emphasis added.)

It is obvious that the clarifying instructions of the Government in this appeal did not *cause* the delay; rather, those instructions put an end to the delay, as has been admitted by appellant.

Moreover, research discloses that it was not the intent of the drafters of the 1957 revision to make the adjustment apply to standby costs incurred prior to the issuance of change orders.¹³ Committee minutes¹⁴ and related material are somewhat scanty. But they show indisputably that the purpose of the revised language was to overcome the problems created by the *Rice* and *Chouteau* decisions, so as to provide adjustment for costs incurred by reason of the issuance of change orders and affecting work which was not physically altered by the changes.

¹¹ However, the Board does not mean to imply that in a proper case, other types of expense incurred prior to the issuance of a change order, and properly attributable to it, cannot be allowed. See *Spencer Explosives, Inc.*, ASBCA No. 4800 (August 26, 1960), 60-2 BCA par. 2795, 2 Govt. Contr. par. 520, allowing costs of research to correct deficient Government specifications and expense of duplicate production to replace rejected quantities.

¹² *Guthrie Electrical Construction*, IBCA-22 (July 22, 1955), 6 CCF 61,687; *M. Hoard*, IBCA-6 (May 11, 1955), 6 CCF 61,665; *Laburnum Construction Corporation*, ASBCA No. 5525 (August 10, 1959), 59-2 BCA par. 2309, 1 Govt. Contr. par. 671; *Norair Engineering Corporation*, ASBCA No. 3527 (April 16, 1957), 57-1 BCA par. 1283 (citing, *inter alia*, *United States v. Rice*, fn. 3, *supra*). See also citations in fn. 9, *supra*, involving claims for delay of the Government in furnishing access to the work.

¹³ "The minutes of the committee sessions are perhaps the best research tools in the field of Government contracts" (Gantt, *Selected Government Contract Problems: Construction Contract Standard Forms—Mistakes in Bids Revisited*, 14 Fed. B.J. 388 (1954), citing *Harwood-Nebel Construction Co. v. United States*, 105 Ct. Cl. 116, 128 (1945)). See also 39 Comp. Gen. 426, 429 (1959).

¹⁴ The Armed Services Procurement Regulation Subcommittee (Chairman, Mr. G. C. Bannerman), drafted the revisions to the changes clause in ASPR 7-103.2 and in other ASPR clauses, for the Department of Defense. The General Services Administration Task Force (Chairman, Mr. Paul Barron) coordinated with the ASPR Subcommittee in the concurrent revisions to Standard Form 32 (1957 Ed.). Comments and recommendations with respect to the proposed revisions were obtained from other Federal agencies and from various industrial organizations.

Direct references in such material to the *McGraw* case indicate that if it should be desirable to overcome the effects of that decision (holding that only an *unreasonable* delay on the part of the Government in issuing a change is actionable in money damages, as a breach of an implied obligation), it would be necessary to insert in the contract appropriate additional language authorizing "suspension of the work." Since the instant contract does not contain a "Suspension of Work" clause, no adjustment can be made.¹⁵

Accordingly, the appeal is denied as to the claim for costs of delays while awaiting the clarification instructions.¹⁶

Conclusion

The appeal is denied in its entirety.

THOMAS M. DURSTON, *Member*.

I concur:

PAUL H. GANTT, *Chairman*.

GROVER C. SANDERSON ET AL.

A-28705

Decided August 28, 1961

Rules of Practice: Hearings—Indian Allotments on Public Domain: Generally

Where a hearing has been held on instructions of the Director, Bureau of Land Management, to determine factual matters in connection with an application for an Indian allotment and where the protestant whose allegations were instrumental in causing the hearing to be held is not notified of the hearing and thereafter submits affidavits contradicting in all material matters the applicant's statements, the affidavits cannot be made part of the record, but the hearing will be reopened to permit the protestant to submit evidence.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Forest Service of the United States Department of Agriculture and Theodosia F. Caldwell each filed a notice of appeal to the Secretary of the Interior from a decision dated October 20, 1960, of the Director of the Bureau of Land Management which concluded that an Indian trust patent previously issued to Grover C. Sanderson ought not to be recommended for cancellation and held that Sanderson's application, Sacramento 045861, should be allowed for a patent for land adjoining the patented land.

¹⁵ *Of. J. A. Jones Construction Company and Charles H. Thompkins Company, IBCA-233* (June 17, 1960), 60-1 BCA par. 2659, 2 Govt. Contr. 373.

¹⁶ It should be observed in passing that such delays were entirely within the periods when the appellant was engaged in identifying and accumulating the ambiguities or discrepancies. Clarifying instructions were furnished immediately by the Government upon telephone inquiry by the appellant, and within three (3) days after the telegraphic inquiry.

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This case stems from an application for an Indian allotment filed by Grover Sanderson on February 15, 1954 for 35 acres adjoining 20 acres which had been previously patented to him on March 12, 1953. On March 8, 1954, Mrs. Caldwell filed a letter opposing the allowance of the application for several reasons. In a decision dated April 21, 1958, the Acting Director of the Bureau of Land Management ordered that a hearing be held to ascertain the facts necessary to the adjudication of Sanderson's application and the determination of whether to recommend the cancellation of the trust patent already issued to him. The decision also held that Mrs. Caldwell was not qualified to contest the Indian allotment. Upon appeal by Mrs. Caldwell, the Department held that because her charges did not meet the requirements of the regulations, she could not bring a contest against the allotment and application. *Theodosia F. Caldwell et al.*, A-27706 (December 16, 1958).

Thereupon the Acting Director ordered that a hearing be held to determine certain facts relating to the establishment and maintenance of the settlement on the land by Sanderson or his ancestors. The hearing examiner who was designated to conduct the hearing sent notice of the hearing to Grover Sanderson, the Forest Service, Bureau of Indian Affairs, and Bureau of Land Management. At the hearing which was held on June 16, 1959, at Hoopa, California, only Sanderson, his witnesses and a representative of the Bureau of Indian Affairs appeared.

In his decision the Director summarized the evidence submitted at the hearing and found that "Sanderson has lived on the land, intermittently, and at irregular intervals, since his birth in 1892, and that, considering the customs, habits, and nomadic instincts of the race, his occupation of the land is adequate to entitle him to an allotment to the land * * *."

On this appeal, the appellants jointly filed in lieu of a statement of reasons for appeal a document entitled "Motion To Receive Evidence" in which they moved that the case be returned to the Director of the Bureau of Land Management with instructions to receive in evidence certain affidavits attached to the motion and decide the case on the record as thus augmented. In an accompanying memorandum the counsel for the Forest Service stated that it had received the affidavits from Mrs. Caldwell and had submitted them to the Bureau of Land Management in January 1955, and that they did not appear to have been considered at the hearing. He also pointed out that the Forest Service did not consider itself an adversary party although it had been named as one in the Director's decision, that it had not appeared at the hearing although it had been notified

of the hearing, and that Mrs. Caldwell had not received notice of the hearing.

An examination of the record demonstrates that in fact Mrs. Caldwell was not served with notice of the hearing, although it was her allegations against Sanderson's application for an allotment that led to the Director's decision to order a hearing.

The affidavits submitted by Mrs. Caldwell, if true, contradict Sanderson's statements in all material points.

The appellants ask that the affidavits be considered by the Director. The Department's rules of practice, however, require that in cases where a hearing is held on instructions of the Director the record shall consist only of the transcript of the testimony or summary of testimony together with all papers and exhibits filed in the hearing and that the record shall be the sole basis for decision on the questions of fact referred for hearing. 43 CFR, 1960 Supp., 221.99 (a), (b). Thus the motion, which asks that the Director consider matters not presented at the hearing, must be denied.

However, in view of the materiality of the affidavits and the failure to notify Mrs. Caldwell of the hearing, it is concluded that the hearing should be reopened and Mrs. Caldwell and the other parties be notified of the date set for the reopened hearing and that she be given an opportunity to present evidence in support of her allegations.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A (4) (a), Department Manual; 24 F.R. 1348), the decision of the Director is set aside and the case is remanded for further proceedings consistent with this decision.

EDWARD W. FISHER,
Acting Solicitor.

UNITED STATES v. CLARENCE E. PAYNE

A-28653

Decided August 30, 1961

Mining Claims: Special Acts—Mining Claims: Surface Uses—Surface Resources Act: Generally

In a proceeding under section 5(c) of the act of July 23, 1955, to determine the rights of a mineral claimant to the surface resources of his mining claim, it must be shown that there has been a valid discovery within the meaning of the mining laws made within the limits of his claim to prevent its being subjected to the terms and limitations of section 4 of that act.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Clarence E. Payne has appealed to the Secretary of the Interior from a decision dated August 8, 1960, of the Director of the Bureau of

August 30, 1961

Land Management which reversed a decision of a hearing examiner holding that his lode mining claim, Block Head II, was not to be subjected to the provisions of section 4 of the act of July 23, 1955 (30 U.S.C., 1958 ed., sec. 612), and held that the claim is subject to the terms and limitations of that act.

Section 4(b) provides, in part, that mining claims thereafter located "shall be subject, prior to the issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof * * *."

Section 5 (30 U.S.C., 1958 ed., sec. 613) sets out the procedure whereby mining claims located before July 23, 1955, may be subjected under certain circumstances to the provisions of section 4. In brief it provides that the head of a Federal department or agency responsible for administering the surface resources of lands belonging to the United States may institute proceedings leading to a determination of surface rights by filing with the Secretary of the Interior a request for publication of notice to mining claimants. After publication and personal service on certain persons, a mining claimant, asserting a right to the surface resources, must file a verified statement listing when the claim was located, the book and page of recordation of the notice of location, a description of the claim, whether the claimant located the claim or purchased it, and his name and address and the names and addresses of other claimants. Failure to file a statement within a certain time constitutes a waiver and relinquishment of any right, title or interest under the mining claim contrary to or in conflict with the limitations and restrictions specified in section 4 as to mining claims located after July 23, 1955.

Section 5(c) provides that if a verified statement is filed "the Secretary of Interior shall fix a time and place for a hearing to determine the validity and effectiveness of any right or title to, or interest in or under such mining claim, which the mining claimant may assert contrary to or in conflict with the limitations and restrictions specified in section 4 of this Act as to hereafter located unpatented mining claims * * *."

As a result of such a proceeding under section 5, Payne filed a verified statement covering the Block Head II claim and a hearing was arranged to be held before a hearing examiner. The notice of hearing stated:

3. MATTERS ASSERTED

As to the unpatented mining claim identified herein, the Bureau of Land Management, through its State Supervisor at Sacramento, California, asserts, and at the hearing will offer evidence to prove, that:

- (a) A discovery of valuable mineral has not been made within the limits of the unpatented mining claim described above.
- (b) For the reason above asserted, the lands included within the claim, prior

to issuance of patent therefor, are subject to use and management by the United States in accordance with the provisions of Section 4 of the Act of July 23, 1955.

At the hearing the Government and the contestee presented evidence describing the mineral values existing on the claim. In brief, it appears that there is a vein of quartz in place which begins about 4 feet below the surface and which, according to witnesses for the United States, pinches out at about the 21 foot level, or which, as the claimant testified, narrows to eight inches and continues below intrusive material cutting across it. The values in the vein were relatively low.

In his decision, the hearing examiner summarized the testimony, stated the rule as to what constitutes a discovery on a lode mining claim, and concluded:

While it is true the values shown at the present time are not sufficient to say that a paying mine exists (the highest value shown by assay report being \$7.00 per ton, Exhibit E), it is also true that by the standards of common prudence a miner would be justified in further exploration even if the odds were against him where the evidence is of such a nature that experts will not testify that the truncated vein will not again appear beyond the intrusive material and have a greater value.

I find here that the claimant is diligently exploring and developing the claim to a point which will be finally determinative of the existence or non-existence of minerals in paying quantities and until such development and exploration are completed, or a lack of interest or diligence is shown, the claim should be left intact without prejudice to the right of the Government to attack the validity of the claim at some future date.

It is therefore determined that the representations made by the above-named mining claimant in the verified statement filed by him are accepted and that as to the Block Head II Quartz Claim, described above, the proceedings brought by the Bureau of Land Management pursuant to Section 5 of the Act of July 23, 1955 are hereby terminated.

This decision does not determine the validity or non-validity of this claim, nor should it be so construed.

On appeal by the United States, the Director stated that—

The purpose of the hearing in this proceeding was solely to inquire and determine whether the Block Head II had been validated by discovery prior to the date of the act.

He then held that the Government had established that no discovery had been made, that the contestee had not refuted the Government's evidence and that as a result the claim was subject to the terms and limitations of section 4.

On appeal the claimant contends that the Director's decision requires the claimant to meet the degree and burden of proof required to obtain a patent, that this was not the policy stated at Congressional hearings considering the legislation, before and after its passage, and that he had prepared for the hearing on the basis that less would be necessary than an applicant for a patent would be required to bring forth.

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The first issue, then, is whether the Director correctly determined that a mining claim will be subject to section 4 unless the claimant can establish that he has made a valid discovery within the limits of his claim just as he would be required to if he were resisting a contest brought against his claim by the United States as a result of an application for patent or of a proceeding initiated by the United States to determine the validity of his claim. Section 5(c) provides that the purpose of the hearing shall be "to determine the validity and effectiveness of any right or title to, or interest in or under such mining claim, which the mining claimant may assert contrary to or in conflict with the limitations and restrictions specified in section 4 of the Act as to hereafter located unpatented mining claims * * *". In other words, the hearing shall determine whether the claimant has any right, title, or interest in the vegetative surface resources of the claim or the management of its other surface resources.

How then does a mineral locator acquire such rights?

Prior to patent a mineral locator can acquire a right, title or interest in the surface resources of a claim only if he has made a valid discovery within the limits of the claim. In a recent case it was held:

* * * even though a location has been made a mining claimant acquires no rights as against the United States until he makes a discovery. Until that time, he is a mere licensee or tenant at will. Upon discovery, and only upon discovery, he acquires as against the United States and all the world an exclusive right of possession to the claim which is property in the fullest sense of the word. *United States v. Carlile*, 67 I.D. 417, 421 (1960); also *Union Oil Co. v. Smith*, 249 U.S. 337, 347 (1919); *Cole v. Ralph*, 252 U.S. 286, 295 (1920).¹

Thus, to establish any right to the surface resources, a mineral claimant must prove that he has made a discovery within the meaning of the mining laws. Conversely, before it can be determined under the act of July 23, 1955, that the holder of a mining claim located before the date of the act does not have any right to the surface resources, it must be proved that he had not prior to the date of the act made a valid discovery within the meaning of the mining laws. *United States v. Carlile*, *supra*. It follows that the Director properly held that the claimant had to establish a valid discovery within the limits of his claim in order to prevail in the section 5 proceeding.

A review of the legislative history of the act of July 23, 1955, demonstrates conclusively that the Congress was aware that the act would require a claimant to prove a valid discovery within the meaning of the mining law. In the hearing held on S. 1713, 84th Congress, a like bill to H.R. 5891, which became the act of July 23, 1955, Ray-

¹ Even after discovery, but prior to patent, a locator has a right to exclusive possession of land within the claim, but only for the purpose of mining, and cannot dispose of surface resources not necessary for mining. *United States v. Etcheverry*, 230 F. 2d 193 (10th Cir. 1956).

mond B. Holbrook, one of the draftsmen of the measure, appearing on behalf of the American Mining Congress testified as follows:

SENATOR BIBLE. You think that is all they can do in this adverse proceeding, take the prospector's surface rights—only his surface rights—from him, even though he does not have a valid discovery?

MR. HOLBROOK. I think it would be very unwise, Senator, if a man did not have any discovery, to contest. I would certainly advise my client not to. I would be disposed to recommend that he file a waiver of any rights. Because I would not want to place in issue the question of discovery. If I lost solely on the grounds that I did not have an adequate discovery, I have made a record that would be available to others.

SENATOR BIBLE. Of course, I think you and I are both familiar enough with the mining law to know that there is a great divergence of opinion as to what is a valid discovery.

MR. HOLBROOK. That is correct. And if there was any question of doubt, I would recommend that he not place that matter in issue. Because I do not think he would be hurt in any way; as I do not think people who locate claims in the future will be hurt. He has the right to use the surface for every use he needs to carry on his mining operations. And when he gets patent, he gets an unlimited title.

SENATOR BIBLE. I understand that. But I am talking about the man who is holding an open location, as so many thousands of prospectors do throughout the West. And of course, I am somewhat intrigued with the burden that it puts upon the small prospector to attempt to defend himself before the administrative officer in the adverse proceeding under section 5. It is certainly going to cost him money, is it not?

MR. HOLBROOK. If he comes in and defends it. Of course, the only purpose of him defending it would be to claim some resource in addition to those he claims for mining.

* * * * *

SENATOR BIBLE. And it is your opinion that section 5 is clearly enough spelled out that the only adverse rights that are affected are surface rights, insofar as an open location is concerned?

MR. HOLBROOK. Yes. Except as to the very point you raised, that the question of discovery may be placed in issue, and its indirect consequences. And there is no way to avoid that, Senator.

SENATOR BIBLE. It seems to me it is in that very field that you might be getting into considerable difficulty. I mean as to whether the prospector thinks he has a valid discovery and the hearing officer thinks he does not.

MR. HOLBROOK. O. K. If that is the issue, I would recommend to my client that he not contest it.

SENATOR BIBLE. Well, sir, if he does not contest it, he would lose the claim.

MR. HOLBROOK. No; he loses nothing.

SENATOR BIBLE. Except surface rights.

(Hearings, Committee on Interior and Insular Affairs, United States Senate, on S. 1713, 84th Congress, 1st Session, pp. 47, 48.)

This colloquy makes it plain that it was understood that a claimant would have to prove a valid discovery to obtain a favorable decision on a section 5 hearing.

Similarly in the hearing held by the Subcommittee on Mines and Mining of the Committee on Interior and Insular Affairs, House of

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Representatives, 85th Congress, on the Administration and Operation of Public Law 167 (the act of July 23, 1955), it was repeatedly stated that the issue in a section 5 hearing will be whether a valid discovery has been made (pp. 29, 33, 36, 37, 38). The following exchanges are particularly illuminating:

MR. THOMSON [Representative, Wyoming]. * * * But the fact is that you make the same findings of fact in order to take away his surface rights that you make in order to take away his entire claim, that you are required by law to do that?

MR. HOFFMAN [Mineral Staff Officer, Bureau of Land Management]. That is correct.

* * * * *

MR. METCALF [Representative, Montana]. The question has been raised by some of the people in Montana: Are you not applying a more rigorous standard for the taking away of surface rights than you would if you contested the original discovery?

MR. HOFFMAN. Mr. Metcalf, there has not been a single hearing held under Public Law 167. It is my personal view that it is no greater or no less than the contest proceedings under the 1872 law to determine whether the mining claimant has a right to the surface. * * *

MR. BRADSHAW [Acting Associate Solicitor, Department of the Interior]. I think it is more than a personal view. I think it is a matter of law. We are bound by the same law in one case as to what constitutes a valid claim as we are in the other.

* * * * *

MR. METCALF. All it is required to prove is that there was an original valid discovery and valid location and recording and continuation of assessments in order that they maintain their surface rights. (Pp. 39, 40.)

Thus it is patent that it was understood both before and after the passage of the act of July 23, 1955, that a mineral claimant would have to demonstrate that he had made a valid discovery on his claim to retain the surface rights in a section 5 proceeding.

Finally, the appellant alleges that he was surprised by the requirement that he prove a valid discovery. Aside from the matters set out above, the notice of hearing itself stated that the United States would offer evidence at the hearing to prove that a valid discovery had not been made within the limits of the claim. At the opening of the hearing, the examiner restated this charge (Transcript 3, 4). Since the claimant raised no objection on either occasion, there is no merit to his belated assertion that he was unaware of what was required of him at the hearing.

Since the evidence would not support a conclusion that the claimant had made a valid discovery within the limits of his claim, the Director's holding that the claim is subject to the limitations and restrictions of section 4 is correct.

Therefore, pursuant to the authority delegated to the Solicitor by

the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management is affirmed.

EDWARD W. FISHER,
Acting Solicitor.

JAMES K. TALLMAN ET AL.

A-28594, A-28609, A-28619

Decided September 1, 1961

Oil and Gas Leases: Lands Subject to—Wildlife Refuges and Projects—

Withdrawals and Reservations: Effect of

Public land withdrawn for the protection of wildlife is not thereby removed from the operation of the Mineral Leasing Act and, in the absence of affirmative action by the Department closing the area to oil and gas leasing, offers to lease the land for oil and gas purposes may be filed.

Oil and Gas Leases: Discretion to Lease

The Secretary of the Interior may, in his discretion, refuse to lease land reserved for a particular purpose but subject to leasing under the Mineral Leasing Act where such leasing would be incompatible with the purpose for which the land is reserved.

Oil and Gas Leases: Applications

Offers to lease lands which were at the time of filing open to the filing of such offers are entitled to prior consideration over offers filed at a later date, following an interim when the area was closed to the filing of such offers.

Oil and Gas Leases: Rentals

Offers to lease lands in Alaska filed prior to and pending on May 3, 1958, are entitled to the benefit of section 10 of the act of July 3, 1958, notwithstanding the fact that action on such offers had been suspended by the Department.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

James K. Tallman and others have appealed to the Secretary of the Interior from decisions of the Director and the Acting Director of the Bureau of Land Management affirming decisions of the Anchorage, Alaska, land office in rejecting their offers, filed on or after August 14, 1958, to lease for oil and gas purposes lands within the Kenai National Moose Range on the Kenai Peninsula, Alaska, pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226). The offers were rejected because they conflicted with leases issued during the fall of 1958, based on offers filed on various dates between October 15, 1954, and January 28, 1955.

The appellants contend that the leases based on the prior offers are null and void because the lands were not open for the filing of offers

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when those offers were filed. They contend that they, the appellants, are the first qualified applicants for the lands. They contend, further, that the prior offers, having been suspended, were not "pending" offers within the meaning of section 10 of the act of July 3, 1958 (72 Stat. 322, 324), amending section 22 of the Mineral Leasing Act (30 U.S.C., 1958 ed., sec. 251), and that it was error to have issued those leases at a rental of 25 cents per acre for the first year of the leases.

The Moose Range was established on December 16, 1941, by Executive Order No. 8979 (6 F.R. 6471). The lands described in the order were, "for the purpose of protecting the natural breeding and feeding range of the giant Kenai moose of the Kenai Peninsula, Alaska, * * *" withdrawn and reserved for the use of the Department of the Interior and the Alaska Game Commission as a refuge and breeding ground for moose.

The order provides, with respect to a large part of the Range, that those lands shall not be subject to settlement, location, sale, or entry or other disposition under any of the public land laws applicable to Alaska or for classification or use under enumerated laws applicable only to Alaska.¹ Small portions of the Range were left available for settlement, location, sale, or entry, with the proviso that those lands were to be classified. Those lands classified as not suitable for settlement were no longer to be available for that purpose.²

The establishment of the Range did not have the effect of removing the lands therein from the operation of the Mineral Leasing Act (30 U.S.C., 1958 ed., sec. 181 *et seq.*). This is so because nothing in the withdrawal specifically excludes those lands from the scope of the act. While such lands are open for leasing under the terms of the Mineral Leasing Act in the sense that offers to lease such lands may be filed, the Secretary of the Interior may, in the exercise of the discretion vested in him by the act, refuse to issue leases covering such reserved areas where the mineral development of the lands might seriously impair or destroy the purposes for which the lands are reserved. *West Central Corporation*, A-28523 (February 2, 1961); *Noel Teuscher et al.*, 62 I.D. 210 (1955); *Martin Wolfe*, 49 L.D. 625 (1923).³

Thus unless some action taken after the Range was established

¹ All of the prior offers involved in these appeals except those in conflict with the Coyle offer (Anchorage 045178) cover lands in this category.

² The prior offers in conflict with Coyle's offer cover land left available for settlement, location, sale or entry.

³ That the Secretary's discretion in the matter of the leasing of lands subject to the operation of the Mineral Leasing Act remains unimpaired, notwithstanding the material revision of that act in 1946, has recently been affirmed by the United States Court of Appeals, District of Columbia Circuit, in *Haley v. Seaton*, 281 F. 2d 620, 625 (1960).

and before these prior offers were filed closed the lands covered by those offers to the filing of oil and gas lease offers, there was no prohibition against the filing of these prior offers.⁴

The only action taken by the Department with respect to lands reserved for the protection of wildlife, but otherwise available for leasing subject to such requirements as might be imposed for the protection and use of the lands for the purposes for which they were reserved (43 CFR 191.5; 43 CFR 192.9), was the suspension, on August 31, 1953, of action on all pending offers for oil and gas leases covering lands within wildlife refuges. This suspension was put into effect because of a study then in progress by the Department to determine whether there should be a revision in the policy of leasing such lands. That suspension did not prohibit the filing of offers to lease such lands but merely ordered the managers of the various land offices not to issue leases on refuge lands. Although that suspension was in effect when the offers in conflict with the appellants' offers were filed, it cannot be said that the lands covered by those offers were not open to the filing of such offers on the various dates on which those offers were filed.

The appellants have not pointed to, and I am not aware of, any action taken by the Department subsequent to the filing of the offers in 1954 and 1955 which would have required the rejection of those offers.

The regulation (43 CFR 192.9) relating to the leasing for oil and gas purposes of lands set aside for the protection of wildlife was amended on December 2, 1955 (20 F.R. 9009), to make certain of those areas unavailable for leasing under the terms of the Mineral Leasing Act, to provide that leases would be issued covering certain other designated areas only upon the approval of complete and

⁴ Appellants contend that Public Land Order 487 of June 16, 1948 (13 F.R. 3462), Public Land Order 1212 of September 9, 1955 (20 F.R. 6795), and an amendment thereof on October 14, 1955 (20 F.R. 7904), indicate an intention on the part of the Department not to open the Range, or at least that part of the Range affected by Public Land Order 487, to mineral leasing applications. Only the land involved in the Coyle offer was affected by Public Land Order 487. That order temporarily withdrew certain land in the Range, including the land covered by prior offers in conflict with the Coyle offer, which had theretofore been available for settlement, location, sale, or entry, from such settlement, location, sale or entry and reserved the land for classification, examination, and in aid of proposed legislation. The order provided that it took precedence over but did not modify the reservation for the Moose Range. However, Public Land Order 487 did not withdraw the land affected thereby from the operation of the Mineral Leasing Act or close that land to the filing of oil and gas lease applications any more than Executive Order No. 8979 did. The prior offers in conflict with the Coyle offer were filed while Public Land Order 487 was in effect.

Public Land Order 1212 revoked Public Land Order 487 and opened the lands for acquisition under specified laws and subject to the conditions set forth therein. Although Public Land Order 1212, as first published, appeared to delay the opening of the lands affected thereby to mineral leasing, the amendment of the order, deleting the language referring to mineral leasing, makes it clear that the order was intended to have no such effect.

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detailed operating programs for those areas, and to set forth the conditions which must be expressed in any leases issued covering the balance of the lands set aside as wildlife refuges. Although that amendment set forth the determination that only those areas designated in Appendix A thereto would no longer be available for oil and gas leasing,⁵ the suspension on the issuance of leases on lands remaining open to leasing was reimposed early in 1956.

On January 8, 1958, the regulation was again amended (23 F.R. 227; 43 CFR, 1959 Supp., 192.9). That regulation defines the various types of lands covered thereby, including Alaska wildlife areas, which are:

areas in Alaska created by a withdrawal of public lands for the management of natural wildlife resources and administered by the United States Fish and Wildlife Service. (Sec. 192.9(a)(4).)

The regulation then sets forth the leasing policy and procedure which will be followed with respect to the various categories of the areas defined. In so far as the regulation is pertinent to the present appeals, it provides that as to the Alaska wildlife areas (into which the Range naturally falls), representatives of the Bureau of Land Management and the United States Fish and Wildlife Service would confer for the purpose of entering into an agreement specifying those lands which shall not be subject to oil and gas leasing but that no such agreement would be effective until approved by the Secretary of the Interior (sec. 192.9(b)(3)); that those lands not closed to leasing would be subject to lease on the imposition of stipulations agreed upon by the two aforementioned agencies of the Department (sec. 192.9(b)(4)); that the agreements referred to in sec. 192.9(b)(3) shall be published in the Federal Register and shall contain a description of the lands affected thereby which are not subject to oil and gas leasing together with a statement of the stipulations agreed upon for inclusion in leases covering lands which shall remain available for leasing, to insure that all operations under such leases shall be carried out in such manner as will result in the minimum of damage to wildlife resources; that the agreements, as supplemented by maps or plats specifically delineating the lands, will be filed in the appropriate land office, and that:

Lease offers for such lands will not be accepted for filing until the tenth day after the agreements and supplemental maps or plats are noted on the land office records. (Sec. 192.9(c).)

Finally, the regulation provides:

All pending offers or applications heretofore filed for oil and gas leases cover-

⁵ The lands involved in the present appeals are not among those lands designated as being unavailable for leasing.

ing * * * Alaska wildlife areas, will continue to be suspended until the agreements referred to in paragraph (b) (3) of this section shall have been completed. (Sec. 192.9(d).)

Thus it was not until the oil and gas leasing regulations were amended on January 8, 1958, that the Kenai National Moose Range was closed to the filing of oil and gas lease offers and the amendment specifically preserved the priorities of all pending offers.

On August 2, 1958, a notice dated July 24, 1958, that an agreement had been consummated, classifying lands within the Kenai Range as to their availability for oil and gas leasing purposes, was published in the Federal Register (23 F.R. 5883). There the Secretary designated those lands within the Range closed to oil and gas leasing. The remaining lands, including all lands involved in the present appeals, were again made subject to the filing of oil and gas lease offers in accordance with the provisions of the Mineral Leasing Act, the regulations in 43 CFR, Part 192, and the provisions of the notice. The notice specifically stated:

Offers to lease covering any of these lands which have been pending and upon which action was suspended in accordance with the regulation 43 CFR 192.9(d) will now be acted upon and adjudicated in accordance with the regulations.

The notice further provided that lease offers for lands which have not been excluded from leasing will not be accepted for filing until the tenth day after the agreement and map are noted on the records of the land office and that all lease offers filed in that office on that day and for ten days thereafter would be treated as having been filed simultaneously.

The agreement and the map were noted on the Anchorage land office records on August 4, 1958, and it was within the ten-day period following August 14, 1958, that the appellants' offers were filed. The appellants were on notice at the time they filed their offers that if there were offers pending covering the lands included in their offers those offers would receive priority of consideration under that regulation in Part 192 which prohibits the issuance of an oil and gas lease before the final action has been taken on any prior offer to lease the land (43 CFR 192.42(m)), under the specific provisions of the January 8, 1958, amendment of 43 CFR 192.9, and under the specific terms of the notice making a portion of the lands within the Kenai National Moose Range available for oil and gas leasing.

In the circumstances, it was proper to have issued leases based on the pending offers, all else being regular.

The point raised by the appellants as to whether the leases based on the pending offers were properly issued at a rental of twenty-five cents per acre for the first year of the lease terms requires little

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discussion. The appellants belabor the difference between a suspended offer and a pending offer. They argue that the twenty-five cent rental applies only to those offers which were pending because the land office had not had the opportunity to process such offers and that it cannot be applied to those offers on which the land office had been directed to take no action.

The act makes no such distinction. Under the provisions of the Mineral Leasing Act in effect when the prior offers were filed non-competitive leases were conditioned upon the payment of advance rentals of not less than twenty-five cents per acre per annum. However, section 22 of the act, known as the Alaska Oil Proviso, authorized the Secretary of the Interior to fix the rental covering noncompetitive leases in Alaska and authorized him, in his discretion, to waive the payment of any rental for the first five years of any such leases. By regulation, the Secretary had fixed the rental of noncompetitive leases covering lands in the continental United States at fifty cents per acre for the first lease year and had fixed the rental on noncompetitive leases covering lands in Alaska at twenty-five cents per acre (43 CFR 192.80). Section 10 of the act of July 3, 1958, amended section 22 of the Mineral Leasing Act to provide:

* * * That the annual lease rentals for lands in the Territory of Alaska not within any known geological structure of a producing oil or gas field and the royalty payments from production of oil or gas sold or removed from such lands shall be identical with those prescribed for such leases covering similar lands in the States of the United States, except that leases which may issue pursuant to applications or offers to lease such lands, which applications or offers were filed prior to and were pending on May 3, 1958, shall require the payment of twenty-five cents per acre as lease rental for the first year of such leases; but the aforesaid exception shall not apply in any way to royalties to be required under leases which may issue pursuant to offers or applications filed prior to May 3, 1958. * * *

The offers on which the leases questioned in these appeals were based were "filed prior to and were pending on May 3, 1958." Thus they meet the test of the statute. The fact that action on those offers was suspended by the Department did not deprive the offers of their status as pending offers and it cannot deprive the offerors of the benefits of the statute.

Accordingly, it was not error to have issued the leases at a rental of twenty-five cents per acre for the first lease year.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decisions of the Director and the Acting Director of the Bureau of Land Management are affirmed.

EDWARD W. FISHER,
Deputy Solicitor.

**ESTATE OF MRS. JACK BOWSTRING OR BONEASHEAK OR PONE AUSH
EKE UNALLOTTED RED LAKE CHIPPEWA INDIAN**

IA-1250

Decided September 11, 1961

**Indian Lands: Descent and Distribution: Generally—Rules of Practice:
Appeals: Timely Filing**

A petition for the reopening of an Indian heirship proceeding more than sixteen years after the Department determined the heirs of the Indian decedent must be denied on the ground it was not submitted within the period of time prescribed in the departmental probate regulations.

APPEAL FROM AN EXAMINER OF INHERITANCE

Jennie Whitefeather, Redby, Minnesota, has appealed to the Secretary of the Interior from a decision of an Examiner of Inheritance, dated February 16, 1961, denying her petition for rehearing or reopening, filed in the matter of the estate of Mrs. Jack Bowstring or Boneasheak or Pone aush eke, deceased unallotted Red Lake Chippewa Indian.

The heirs of the above decedent were determined by the Acting Commissioner of Indian Affairs on November 22, 1944.¹ On April 7, 1960 (4612-60), the original order of November 22, 1944 was modified by an Examiner of Inheritance solely for the purpose of including omitted property as a part of the estate. This modification did not affect the original order, in so far as the determination of decedent's heirs and their respective shares are concerned. Neither did the modification have any effect of tolling any period of limitations during which objections might have been received against the original decision, including the determination of heirs made therein.

On February 7, 1961, the above appellant filed an instrument styled "Petition for rehearing," alleging that the determination of heirs in the present case is erroneous, and that it omitted two of decedent's kin, now deceased, who were living at the time of Mrs. Jack Bowstring's death in 1936.

The Examiner in his action of February 16, 1961 on appellant's petition, referred to that document as a petition to reopen, and based his denial of the petition to reopen on that portion of the Departmental probate regulations which fixes a time limitation of three years from the date of the decision complained of in which petitions to reopen the probate of Indian estates must be filed.² The petition in question was not filed until more than 16 years after the heirs of the decedent had been determined.

¹ At that time the authority to determine heirs to restricted Indian estates had been delegated to the Commissioner of Indian Affairs, under regulations approved December 17, 1943 (25 CFR, 1943 Supp., 81.0 (g)).

² 25 CFR 15.18 (1958 ed.).

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This Department's position in matters of this kind has been made the subject of a number of decisions declining to reopen decided cases after the lapse of many years. For instance, in the Department's decision on the estate of Abel Gravelle, deceased Flathead allottee No. 1886,³ a petition to reopen the estate fifteen years after the heirs of the decedent had been determined was denied, and the Department refused to waive the time limitations prescribed in the regulations for the reopening of Indian estates, stating:

The public interest requires that proceedings relating to the probate of Indian estates be brought to a final conclusion some time in order that the property rights of the heirs or devisees may be stabilized. It is for this reason that the departmental regulations have prescribed, and now prescribe, a maximum period within which petitions for the reopening of Indian probate proceedings may be filed.⁴

Those provisions in the probate regulations which give repose to decided matters of long standing have a particularly salutary effect in situations such as the present. The record discloses that disposition has been made of a portion of the above decedent's property, and that a fee patent has been requested for the remainder of the estate. Action on the fee patent application has been withheld pending final consideration of the present appeal.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (Sec. 210.2.2A(3)(a), Departmental Manual, 24 F.R. 1348), the order of the Examiner of Inheritance, denying appellant's petition, is affirmed, and the appeal is dismissed.

EDWARD W. FISHER,
Deputy Solicitor.

PROPOSED CONTRACT WITH THE COACHELLA VALLEY COUNTY WATER DISTRICT FOR REHABILITATION AND BETTERMENT WORK, COACHELLA DIVISION, ALL-AMERICAN CANAL SYSTEM

Bureau of Reclamation: Rehabilitation and Betterment

Work undertaken pursuant to the Rehabilitation and Betterment Act of October 7, 1949 (63 Stat. 724) is to provide a means whereby such work in the nature of deferred maintenance can be financed over an extended period and not as an annual operation and maintenance charge. The work is usually of a type that does not provide substantial additional water or provide for irrigation of substantial areas of new lands.

Bureau of Reclamation: Rehabilitation and Betterment

A regulating reservoir constructed for the purpose of improving operations of the irrigation system is a facility associated with operation and main-

³ IA-75, decided April 11, 1952.

⁴ See also Estate of Smoky Jim, IA-148 (June 20, 1955); Estate of Blue Bug, IA-174 (June 20, 1955).

tenance, and would not be considered in the nature of supplemental construction.

Bureau of Reclamation: Rehabilitation and Betterment

The fact that such regulating reservoir could have been included in the works originally constructed does not rule it out as proper work undertaken as deferred maintenance pursuant to the Rehabilitation and Betterment Act.

M-36621

September 13, 1961

TO: THE SECRETARY OF THE INTERIOR.

Subject: Proposed Contract with the Coachella Valley County Water District for Rehabilitation and Betterment Work, Coachella Division, All-American Canal System

The Under Secretary's memorandum of July 12 referred to a question raised at a hearing before the Senate Interior and Insular Affairs Committee on June 29, 1961, concerning the proposal for rehabilitation of works of the Coachella Valley County Water District. The question that was raised was whether the work proposed was authorized in accordance with the provisions of the Rehabilitation and Betterment Act of October 7, 1949 (63 Stat. 724), with particular reference to the construction of a 3500 acre-foot regulating reservoir. This was considered by our office at the time we reviewed the proposed contract and we then concluded that the works came within the scope of that Act.

We have again reviewed all of the work proposed pursuant to the report of the Bureau of Reclamation dated February 1961 which accompanied the transmittal to the Congressional Committees. We reaffirm our earlier conclusion.¹

The Rehabilitation and Betterment Act defines "rehabilitation and betterment" as "maintenance including replacements, which cannot be financed currently, as otherwise contemplated by the Federal reclamation laws in the case of operation and maintenance costs, but shall not include construction, the costs of which are returnable * * * through construction charges, as that term is defined in section 2(d) of the Reclamation Project Act of 1939."

The purpose of the Act is to provide a practicable means of repayment of the costs of major rehabilitation and maintenance programs which cannot be met currently as is the usual requirement for operation and maintenance under the Federal reclamation laws. The Act was designed to ease repayment problems in order to make it possible to

¹ Most of the work proposed provides for control of water movement under an operation and maintenance program, elimination of moss and protection of works through construction of dikes. As to this work, there appears to be no question that it is of the type that is usually undertaken by the Bureau of Reclamation pursuant to the Rehabilitation and Betterment Act of 1949.

maintain Federal reclamation projects in normal operating condition and to incorporate into such projects modifications considered desirable on the basis of advances in engineering knowledge and techniques. The Rehabilitation and Betterment Act is, therefore, a remedial measure and comes within that class of statutes which are to be construed liberally, rather than narrowly, in order to accomplish their objectives.²

Criteria used administratively for considering work pursuant to the Act usually start with the premise that no new lands would be served and no additional water supply would be furnished. Using this as a first premise ordinarily serves to distinguish the work from what would be called supplemental construction for the purpose of providing additional water or for serving additional lands.

The regulating reservoir proposed under the Coachella work program does not contemplate the furnishing of additional water or serving additional lands, but is primarily the facility that will prevent the district from wasting water unnecessarily in the operation of the canal and distribution system. Because of the length of the system for delivery of water, both in the channel of the Colorado River after its release from Hoover Dam and after it is diverted at Imperial Dam into the All-American Canal, changes in the pattern of orders for water delivery often result in having a larger supply of water available that can be utilized on the lands. This requires the district to waste the water out of the system. Thus the regulating reservoir is designed to avoid wastage of water by enabling a higher degree of operational control. In the water short West, the saving of water is always desirable. In the context of a water supply dependent upon the Colorado River, practicable means of avoiding water waste in project operations are more than merely desirable, they must be considered a necessity.

A review of past Rehabilitation and Betterment Contracts entered into by the Department discloses one other case in which a somewhat similar reservoir was included. The Contract of June 15, 1958, with the South Ogden Conservancy District in Utah, covered the construction of four miles of coated steel and concrete pipe and also for the construction of a concrete lined equalizing reservoir with a capacity of 11.5 acre-feet. This reservoir was constructed for the purpose of permitting orderly deliveries of water to this small system and also for the purpose of eliminating the wasting of water when delivery orders would be changed. This case is similar and varies only as to size. There the project covers only some 3,259 acres of land with a very small supply system. Coachella, on the other hand, is served through

² *United States v. Southern Pacific R. Co.*, 184 U.S. 49; *United States v. Colorado Anthracite Co.*, 225 U.S. 219; *Gertgens v. O'Connor*, 191 U.S. 237.

the All-American and Coachella Branch Canals, 159 miles in length, with an allocated capacity of 1,500 c.f.s. to serve an area of 68,000 acres. Obviously, project works must of a size proportionate to the particular need.

Another case, and one which illustrates the broad scope that has at times been given to the Rehabilitation and Betterment Act, is the work done under the Act for the Medford and Rogue River Valley Irrigation Districts. These two Districts were not Federal reclamation projects and, therefore, were brought under the Rehabilitation and Betterment Act by a special Act of Congress, the Act of August 20, 1954 (68 Stat. 752). The work involved was to rehabilitate their systems solely for the purpose of making them capable of accepting and using 9,000 acre-feet of additional water that was to be furnished from the Rogue River project, with the result that some additional lands were to be irrigated. The presentation to Congress by the Department shows that the work was considered to be of the type falling under the Rehabilitation and Betterment Act, and that Congressional authorization was needed not because of the type of work, but because the Districts would not otherwise be eligible since they were not a Federal reclamation project. There is no indication that the Congress considered that it was doing anything more in passing the authorizing legislation than enabling the two Districts to be treated as a Federal reclamation project for work considered to be within the scope of the Rehabilitation and Betterment Act. Thus, with Congressional concurrence, the Act has been considered as covering not merely a case like that of the Coachella equalizing reservoir which involves prevention of waste of water, but one which involves the provision of an added water supply and the adding of irrigated lands.

Nampa and Meridian Irrigation District v. Bond, 268 U.S. 50 (1925) removes any doubt that work of the nature of that here under consideration may properly be classed as maintenance rather than as construction.

That case involved the Boise Federal Reclamation Project. The plaintiff district was a part of that project representing the landowners within the district boundaries. A drainage system had been constructed as a part of the original undertaking and the costs included in the construction charges allocated to the lands within the district. Later, a need for additional drainage developed and the Secretary of the Interior authorized the construction of this additional drainage, the cost being assessed to the landowners as an operation and maintenance charge. The irrigation district contended that this was additional construction and that it could not be charged for this work as an operation and maintenance charge and brought

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suit to compel the Government to deliver water notwithstanding the District's refusal to collect and pay the charge for the work. The District Court, the Circuit Court of Appeals and the Supreme Court held that the work was properly chargeable as operation and maintenance. The Supreme Court said (268 U.S. 50, 53):

Expenditures necessary to construct an irrigation system and put it in condition to furnish and properly to distribute a supply of water are chargeable to construction; but when the irrigation system is completed, expenditures made to maintain it as an efficient going concern and to operate it effectively to the end for which it was designed, are, at least generally, maintenance and operating expenses. The expenditure in question was not for extensions to new lands or for changes in or additions to the system made necessary by faulty original construction in violation of contractual or statutory obligations, *Twin Falls Co. v. Caldwell*, 272 Fed. 356, 359; 266 U.S. 85, but was for the purpose of overcoming injurious consequences arising from the normal and ordinary operation of the completed plant, which, so far as appears, was itself well constructed. The fact that the need of drainage for the district lands, already existing or foreseen, had been supplied and the cost thereof charged to all the water users as a part of the original *construction*, by no means compels the conclusion that an expenditure of the same character, the necessity for which subsequently developed as an incident of operation, is not a proper *operating* charge. The same kind of work under one set of facts may be chargeable to construction and under a different set of facts may be chargeable to maintenance and operation. (The emphasis is by the Court.)

Even more instructive as to the sweep to be accorded the term "operation and maintenance" are the remarks of Judge Dietrich in the District Court's opinion in this case:

There is the further contention that this is not a proper charge for "operation and maintenance." These terms are found both in the Reclamation Act, as amended, and the contract between the plaintiff district and the United States. They are of elastic and often indefinite import. In systems of accounting, especially of public service corporations, what should be entered as capital or construction, and what as operation and maintenance, is not infrequently a question of great difficulty, and is sometimes susceptible of only an arbitrary answer. If in strictness we undertake to apply the narrow view advanced by the plaintiff that the maintenance of an irrigation system is accomplished by "merely maintaining the status quo" of the physical plant, we are soon driven to absurdities. If a wooden headgate rots out, we could not replace it with one of concrete, though satisfied that in the long run it would be economy so to do. If there turns out to be excessive seepage in a section of the canal, it cannot be prevented by puddling or otherwise treating the canal to prevent waste, for that would be to change the status quo. If there is a break in the earth bank of the main canal on a hillside, however great the danger of a repetition of the break, and however prudent it would be to reinforce the earth with a concrete lining, thus insuring against future disaster, such a course would be to alter the status quo, and therefore could not be followed without putting into motion the complicated machinery required for raising money for new construction work. Illustrations without number of the inadequacy and impracticability of such a view will readily occur to any one who has observed the operation of a large irriga-

tion system, either at close range or from a distance. The government has fixed the construction charge upon this system, under the law, and it cannot now add to it without the consent of a majority of all of the water users. If, in the management of this great system, with its hundreds of miles of canals, its dams and gates, and a multitude of devices for diverting, impounding, carrying, and distributing water, it cannot in an intelligent way provide for new conditions, or in the light of experience make new and better provision for old conditions, by charging the reasonable expense thereof to maintenance and operation, the value and efficiency of the system would be greatly impaired. Surely such a result could not have been intended by Congress, or by the parties to the contract here involved. The terms "maintenance" and "operation" must have been used in a broader sense—a meaning perhaps not susceptible to precise and comprehensive definition, but none the less well understood. (283 Fed. 569, 571-572)

The same reasoning applies to the question herein presented as to the regulating reservoir and leads to the conclusion that while it could have been constructed as a part of the original construction and the costs charged as a construction charge, it is entirely appropriate to build it as an operating facility with the costs charged as operation and maintenance and thus eligible for repayment under the provisions of the Rehabilitation and Betterment Act.

That to some degree "potential inadequacies" in the Coachella system were recognized at the time of original construction,³ does not, in my opinion, diminish the authority of the Secretary to determine that the work is properly maintenance, construction having been completed under the repayment contracts. Whether the regulating reservoir is in the category of an originally recognized deficiency is not clear. In any event, however, the Secretary has discretion to determine the extent to which project facilities of a nature which do not themselves significantly add to the size of the project will be included as original construction or be left for later provision when the project is in an operating stage. Consideration of cost limitation may be legitimately taken into account in arriving at such a decision. Particularly is this true in a case such as the one here presented where the need for the regulating reservoir was not critical until the project lands approached full development and when the seriousness of the problem could not have been foreseen at the time of original construction in the absence of advance knowledge of the exact cropping pattern and practices.⁴

FRANK J. BARRY,
Solicitor.

³ See Commissioner's memorandum to Secretary dated May 22, transmitting the rehabilitation and betterment proposal.

⁴ See the Coachella rehabilitation and betterment program report of the Bureau of Reclamation, dated February 1961, pages 4-5.

September 27, 1961

RANDOLPH RITCHEY v. CLIFTON O. MYLL AND MARY E. KINDY

A-28649

*Decided September 27, 1961***Rules of Practice: Private Contests**

A contest complaint which alleges as a ground for contest the fact that the entryman has failed to file timely final proof is properly dismissed because that reason is shown upon the records of the Bureau of Land Management and a contest must be based upon a reason not so shown.

Rules of Practice: Private Contests

Under departmental regulations governing private contests, a contest charge which is defective because it offers as a ground for the contest only a reason shown upon the records of the Bureau of Land Management is not cured by the allegation that extrinsic facts are necessary to prove the correctness of the charge where the extrinsic facts are not set out as grounds for the contest.

Applications and Entries: Generally—Secretary of the Interior

The Secretary of the Interior (or his delegate) has authority to suspend desert land or other entries when he considers the circumstances to warrant such action.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Randolph Ritchey has appealed to the Secretary of the Interior from a decision dated August 8, 1960, of the Director of the Bureau of Land Management which affirmed the dismissal of a contest initiated by him against desert land entry Los Angeles 039478 on the ground that the reason alleged by Ritchey as the basis for having the entry canceled was disclosed by the records of the Bureau of Land Management.

A desert land entry (43 U.S.C., 1958 ed., sec. 321 *et seq.*) was allowed to Mrs. May E. Patton on June 2, 1917. It appears that the entrywoman filed the required annual proofs, but having failed to irrigate the land, she applied for and was granted several extensions of time, the last running to June 2, 1930, in which to submit final proof, which otherwise would have been due within four years from the date of entry. *Id.*, sec. 329.¹ The entrywoman died on January 28, 1929. In the meantime the land in the entry, among others, was included in a reclamation withdrawal on October 19, 1920, pursuant to the act of June 17, 1902 (43 U.S.C., 1958 ed., sec. 416), for the Yuma Irrigation Project.

It appears that after the expiration of the third extension the entry was considered to be suspended under the policy of the Department stated in the case of *Maggie L. Havens*, A-5580 (October 11,

¹ The extensions were granted pursuant to the acts of March 28, 1908, April 30, 1912, and February 25, 1925 (43 U.S.C., 1958 ed., sec. 333, 334, and 336, respectively).

1923). That decision held that a desert land entry, covered by a later reclamation withdrawal, on which the entryman has met all the requirements that he can, but cannot meet them in full because of the absence of water, is to be suspended until water for the irrigation of the land covered by it becomes available, or until it shall be found advisable to revoke the suspension for any sufficient reason arising thereafter.

No attempt was made to develop the entry by the heirs of Mrs. Patton. An affidavit and a letter signed by officials of the Coachella Valley County Water District, submitted by Ritchey, states that the "lands" in the entry "were notified" in 1949 of the availability of water and that, upon proper application, service would have become available. On April 19, 1954, the Bureau of Reclamation issued Public Notice No. 1 announcing that water was available for an area of land including the Patton entry. The notice described the entry as entered land and designated it as Farm Unit No. 1E in Irrigation Block 1 of the Coachella Division of the All-American Canal System, Boulder Canyon Project, California. Section 20 of the notice stated that the designation of an area as an irrigation block meant that irrigation water is available through works to be constructed at substantially the same time and that Irrigation Block 1 was designated on July 3, 1950.

By letter dated September 19, 1956, C. F. Patton, who is not one of the entrywoman's heirs, informed the land office that Mrs. Patton had died and made several inquiries on behalf of the heirs about the status of the entry and other related matters.

On November 16, 1956, Mary E. Kindy filed an application for approval of an assignment of the entry to her by the heirs of May E. Patton. On February 4, 1957, Clifton O. Myll filed a protest against Mrs. Kindy's assignment alleging that it had been obtained by fraud and misrepresentation. On March 4, 1957, Ritchey filed contest 6801 (Los Angeles) against the Patton entry, naming as parties, the entrywoman, Mrs. Kindy and Myll. Finally on March 24, 1959, Myll filed an application for approval of an assignment to him of the entry by the heirs of May E. Patton.

In a decision dated July 20, 1959, the land office rejected Mrs. Kindy's application for assignment and approved Myll's. It then dismissed Ritchey's contest on the ground that Ritchey had failed to serve notice of the contest on any of the heirs of the deceased entrywoman and then, considering the contest as a protest, dismissed it too.

Ritchey and Mrs. Kindy thereupon took separate appeals to the Director. In his decision of August 8, 1960, the Director held that the reason given by Ritchey as a basis for his contest, that is, that final proof had not been made within the time allowed by law was one shown on the records of the Bureau of Land Management and

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thus could not be used as a basis for a contest. He also held that the entry had been properly suspended under the rule in the *Havens* case, *supra*, a Departmental holding that the Director could not change or modify. Finally he held that the land office had properly rejected Mrs. Kindy's assignment.

Since Mrs. Kindy did not appeal from the Director's decision, the rejection of her assignment has become final and is not an issue in this appeal.

Ritchey, however, duly appealed. He contends that the Patton entry was subject to cancellation either because a suspension of the entry under the *Havens* decision was beyond the authority of the Secretary or, assuming it to be valid, because the suspension terminated when water in fact became available for entry in 1949 or 1950. He also insists that his complaint was not based on matters shown by the records of the Bureau of Land Management but on extrinsic facts that the record did not reveal.

Since the sufficiency of the contest complaint is basic to the appeal, it will be examined first. The pertinent regulation provides:

By whom private contest may be initiated. Any person who claims title to or an interest in land adverse to any other person claiming title to or an interest in such land or who seeks to acquire a preference right pursuant to the act of May 14, 1880, as amended (43 U.S.C. 185), or the act of March 3, 1891 (43 U.S.C. 329), may initiate proceedings to have the claim of title or interest adverse to his claim invalidated for any reason not shown by the records of the Bureau of Land Management. Such a proceeding will constitute a private contest and will be governed by the regulations in this part. (43 CFR, 1960 Supp., 221.51.)

Contents of complaint. The complaint shall contain the following information, under oath: ☉

* * * * *

(d) A statement in clear and concise language of the facts constituting the grounds of contest. (43 CFR, 1960 Supp., 221.54 and 221.54(d).)

In his complaint, Ritchey stated the facts constituting the grounds of contest as follows:

MAY E. PATTON's entry was allowed on June 2, 1917, almost 40 years ago. The annual proof has not been made, nor has final proof been made, within the time permitted by law, and the entry is therefore subject to cancellation.

Since the failure to file annual or final proof is evident solely on the records of the Bureau of Land Management and nowhere else, it is plain that under the regulations quoted a contest complaint cannot be based on such an allegation.

Ritchey's assertion that extrinsic facts are necessary to show that all is not in order, even if true, is without merit because he did not state them as grounds for the contest.² Therefore, his contest complaint was properly dismissed.

² The complaint fails to comply with several other requirements of the regulation, namely, it is uncorroborated (43 CFR, 1960 Supp., 221.56), and it does not state the law

In any event the only facts to which the contest adverts are those relating to the availability of water for irrigation of the entry. The case record contains a copy of a letter dated June 3, 1954, and received in the land office June 4, 1954, from the Regional Director, Region 3, Bureau of Reclamation, to the entrywoman stating that her entry had been designated as Farm Unit 1E and enclosing a copy of Public Notice No. 1 (*supra*). The letter and the notice make it plain that water was available for the entry no later than 1954. Since the contest was not filed until March 4, 1957, it is obvious that the "extrinsic facts" on which the contestant relies were part of the record.

Next Ritchey's contentions that the Department had no authority to suspend the entry and others similarly situated and that the *Havens* decision was void is without merit. The Department has always suspended entries in situations it deemed necessary and its authority to do so has been recognized by the Congress and the courts. See *Jacob A. Harris*, 42 L.D. 611, 614 (1913), cited in *Lane v. Hoglund*, 244 U.S. 174, 180 (1917), in which the Department referred to the act of March 3, 1891 (43 U.S.C., 1958 ed., sec. 165), as having been "[p]assed, primarily, to rectify a past and to prevent future abuses of the departmental power to suspend entries * * *."

There remains only the appellant's argument that, in any event, the period of suspension ended when the water in fact became available in 1949 or 1950. Since, as we have seen, the facts relating to the availability of water were shown by the records of the Bureau of Land Management, the termination of the suspension for this reason would not cure the defects in appellant's contest complaint. It might, however, afford a basis for the initiation of proceedings by the Department to cancel the entry, if it in some way put the entrywoman or her heirs in default.

The record of the Patton entry should be carefully examined to determine when the suspension of the entry terminated, what obligations under the desert land law and the reclamation law it then became subject to, and whether these obligations have been timely met. If it is concluded that the time for filing final proof has passed and that the entry is subject to cancellation on that ground, then proceedings should be initiated pursuant to 43 CFR 232.34.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of Land Management dismissing the contest is affirmed and the case is remanded for further proceedings in accordance with this decision.

EDWARD W. FISHER,
Deputy Solicitor.

August 24, 1961

REGULATION OF NATIONAL RECREATION AREAS 36 CFR, PART 2

Constitutional Law—Secretary of the Interior

Pursuant to Article IV, Section 3, Clause 2 of the Federal Constitution the Congress may legislate for the reasonable protection and use of lands held by the United States in a proprietary status, including the imposition of criminal sanctions. The Act of August 25, 1916, as amended (39 Stat. 535; 16 U.S.C., sec. 3) authorizes the Secretary of the Interior to promulgate rules and regulations reasonably related to the protection and use of such lands "under the jurisdiction of the National Park Service."

Words and Phrases

The term "reservation," as used in section 3 of the organic act of the National Park Service (Act of August 25, 1916, 39 Stat. 535) refers to the present use of Federal lands and not their source or origin, that is, whether acquired lands or public domain lands.

National Park Service Areas: Rules and Regulations—Bureau of Reclamation: Generally

The Shadow Mountain National Recreation Area is located primarily on acquired lands. Its administration has been assigned to the National Park Service pursuant to a cooperative agreement with the Bureau of Reclamation. It is a reservation within the meaning of the Act of August 25, 1916, as amended. By the Act of August 7, 1946 (60 Stat. 885, 16 U.S.C., sec. 17j-2(b)) such reservations were placed under the jurisdiction of the National Park Service, thereby vesting the Secretary of the Interior with authority to promulgate reasonable rules and regulations for the protection and use of the area, including the imposition of criminal sanctions.

M-36614

August 24, 1961

TO THE DIRECTOR, NATIONAL PARK SERVICE.

In a memorandum dated October 5, 1960, the Acting Director, National Park Service, inquired whether this Department may enforce the regulations presently applicable to national recreation areas (36 CFR, Part 2) under the criminal provisions of Section 3 of the Act of August 25, 1916, as amended (39 Stat. 535; 16 U.S.C. sec. 3).

The question arose as the result of advice given to the Superintendent of the Shadow Mountain National Recreation Area in a memorandum dated June 28, 1960, by the then Regional Solicitor, Denver, Colorado, concerning the application of criminal sanctions to a civil engineer who had begun construction of an access road across Government lands within the recreation area. The advice given was, among other things, that punishment for the violation of the regulations for the control of recreation areas has never been provided

for by statute, and that no criminal penalty could be imposed for the violation of such regulations.

It is my opinion that the regulations now found in 36 CFR, Part 2, may be enforced under the criminal provisions of Section 3 of the Act of August 25, 1916. In order, however, to make clear the intent of the Secretary to enforce such regulations, there should be added to 36 CFR, Part 2, a provision making the violation of such regulations punishable by fine or imprisonment. (At present the provisions in Part 1, 36 CFR, including the penalty provisions, are specifically excepted from application to national recreation areas, National Capital Parks and national cemeteries. Special penalty provisions have been promulgated for the latter two. (See 36 CFR, secs. 3.5, 3.101, 4.4 and 4.25.)

The Shadow Mountain Recreation Area is located primarily upon lands which were acquired by the Bureau of Reclamation for project purposes.¹ The administration of all four of the recreation areas has been assigned to the National Park Service pursuant to cooperative agreements. Although the language in each agreement is different, the National Park Service agrees, in effect, to promulgate such rules and regulations as may be required for the administration and protection of the areas as well as the people using the areas. As stated, the United States has only proprietary jurisdiction over many of the lands on which the national recreation areas are located. There is, however, no longer any doubt that Congress has the power under Article IV, Section 3, Clause 2 of the Constitution of the United States to authorize the Secretary of the Interior to promulgate rules and regulations having criminal sanctions for the purpose of protecting land held by the United States in such proprietary status. *Natchez Trace Parkway*, 58 I.D. 467 (1943), and cases cited therein. The rules, however, can relate only to those powers which are "reasonably related to the protection and use of the property." (58 I.D. 467, 471-472.) Accordingly, rules and regulations having criminal sanctions are valid, if reasonably related to the protection and use of the property, and if Congress has authorized the promulgation of such rules and regulations for recreation areas supervised by the National Park Service under a cooperative agreement. It is my opinion that Congress has authorized the promulgation of such rules and regulations for the reasons set forth hereinbelow:

The Act of August 25, 1916, as amended, provides in Section 3 that the Secretary of the Interior shall make such rules and regulations as he may deem necessary or proper

¹ The other three national recreation areas include both acquired and withdrawn public lands. They are: Lake Meade National Recreation Area, Arizona and Nevada; Coulee Dam National Recreation Area, Washington; and Glen Canyon National Recreation Area, Arizona and Utah. (See 36 CFR, sec. 2.1(a)(1)-(4)).

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for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service, and any violation of any of the rules and regulations . . . shall be punished by a fine of not more than \$500 or imprisonment for not exceeding six months or both. . . .

It is clear that the term "reservations" includes public lands which have been withdrawn for a public use or purpose, including the secondary use of a reclamation area as a "bird reserve."² In my opinion the term "reservation" as used in the Act of August 25, 1916, also applies, contrary to the conclusion reached by the Regional Solicitor,³ to acquired lands which are set aside for a public use or purpose. For example: (1) *Lake Texoma Recreational Area*—lands acquired by the Secretary of War and used by the National Park Service pursuant to a cooperative agreement are subject to the enforcement provisions of the Act of August 25, 1916 (Solicitor's Opinion M-34644, September 3, 1946, approved by the Assistant Secretary on the same date); (2) *Mount Vernon Memorial Highway*—acquired lands expressly held to be a "Federal reservation" and subject to the Act of August 25, 1916 (Solicitor's memorandum to Assistant Secretary dated November 22, 1939, approved November 27, 1939, by the Assistant Secretary); (3) *Piedmont Wildlife Refuge*—The Act of February 15, 1901 (31 Stat. 790, 43 U.S.C. 959), which authorizes the Secretary of the Interior to permit the use of rights-of-way through "the public lands and reservations of the United States for electrical plants, poles . . .," provides the statutory authority to issue permits for rights-of-way for the construction of electrical transmission lines across lands *acquired* by the United States for national refuge purposes (Memorandum to the Under Secretary from the Office of the Solicitor dated October 17, 1940, approved by the Under Secretary on November 1, 1940); (4) *Chesapeake and Ohio Canal*—acquired lands held subject to the Act of August 25, 1916 (Solicitor's Opinion M-33756, September 18, 1944); (5) *Park system of the District of Columbia*—certain lands acquired by purchase and donations from individuals for the City of Washington were "reserved, on order of the President, for public use" and were designated as "reservations" long prior to the enactment of the Act of August 25, 1916. Such "reservations" were placed under the jurisdiction of the National Park Service by the inclusion of the

² S. Rep. 676, 62d Cong., 2d Sess. (1912), on S. 3463, a bill to establish a Bureau of National Parks. Also see Solicitor's Opinions M-28693 and M-28694, October 13, 1936, holding that the recreational activities on the public lands withdrawn under the first form by the Bureau of Land Management for the Boulder Canyon Project were placed under the jurisdiction of the National Park Service by an act which appropriated money for the "administration, protection and maintenance of the recreational activities of the Boulder Canyon project. * * *" (Act of June 22, 1936, 49 Stat. 1794.)

³ The Regional Solicitor concluded that—

"The word 'reservation' * * *, even where its meaning has been extended, * * * has never been construed to [mean] lands acquired by purchase by the United States."

* * * * *

"It is clear that the lands acquired by the Bureau of Reclamation and turned over to the National Park Service pursuant to the memorandum of understanding approved Au-

term "reservations" in the following quotation from Executive Order No. 6166, June 10, 1933: "public buildings, reservations, national parks, national monuments and national cemeteries." Since then such reservations have been administered by the National Park Service pursuant to the Act of August 25, 1916, including the enforcement of criminal sanctions. (*Van Ness v. City of Washington and United States*, 29 U.S. 239 (1830); S. Doc. No. 632, 61st Cong., 2d Sess., p. 3 (1910); Act of July 1, 1898 (30 Stat. 570); Act of March 2, 1934 (48 Stat. 385, 389); and 36 CFR secs. 3.5 and 3.48.

The definition of the term "reservation" in the Department's "glossary of Public-Land Terms" is consistent with this view, to wit, "any Federal lands which have been dedicated to a specified public purpose."

From this history of administrative and legislative action, it is clear that the term "reservation" in the 1916 Act includes both public domain and acquired lands set aside for a public use or purpose. However, in order for a reservation to be subject to the 1916 Act it must be placed "under the jurisdiction of the National Park Service" (16 U.S.C. sec. 3).⁴ In my opinion, such jurisdiction over the recreation reservations was provided when the National Park Service was given the authority to administer and protect such reservations. The authority referred to is contained in the Act of August 7, 1946 (60 Stat. 885, 16 U.S.C. sec. 17j-2(b)) which states that:

Appropriations for the National Park Service are authorized for—

(b) administration, protection, improvement and maintenance of areas, under the jurisdiction of other agencies of the Government, devoted to recreational use pursuant to cooperative agreements.

The aforesaid Act of August 7, 1946, was an act of substantive legislation. The legislative history and title of the act show that the purpose of the bill was to provide "basic authority for the performance of certain functions and activities of the National Park Service."⁵ Such history also shows that the phrase in section (b) of the Act, "pursuant to cooperative agreements," was inserted to protect the *primary* jurisdiction of other agencies, thereby recognizing the concept of shared jurisdiction (see footnote 4, *supra*).

gust 3, 1955, * * * are not a reservation. It follows that the National Park Service had no statutory authority to adopt rules and regulations for the use and management of acquired lands." (Memorandum to the Deputy Solicitor dated December 2, 1960, at pages 6-7.)

⁴ Jurisdiction has been defined as a term "* * * having different meanings, dependent on the connection in which it is found and the subject matter to which it is directed * * * often used without any determinate significance * * * [and] in relation to the functioning of an administrative agency, it is not necessarily one of legal technicalness but may be simply a general characterization of the field of powers and duties of that agency in administering or enforcing law." *General Trades School v. United States*, 212 F. 2d 656, 659 (8 Cir. 1954).

The concept of shared jurisdiction over lands of the United States has been long recognized. See 33 L.D. 609, 610 (1905), Right-of-Way—Forest Reserves—Jurisdiction.

⁵ (H.R. Rep. No. 2459, 79th Cong., 2d Sess. (1946)).

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The National Park Service, therefore, by the Act of August 7, 1946, received from Congress authority to administer, protect, improve, and maintain the areas "under the jurisdiction of other agencies of the Government, devoted to recreational use pursuant to cooperative agreements."⁶ Congress could have only meant for the authority to be exercised in accordance with the statutes regularly applicable to the National Park Service. Otherwise, the granting of the authority would be a meaningless act and the transfer of administration for recreational uses would be without purpose. I conclude, therefore, that Congress intended that the authority contained in the 1946 Act should be exercised in accordance with the provisions of the Act of August 25, 1916, as amended, including the right to promulgate rules and regulations having criminal sanctions.

EDWARD W. FISHER,
Deputy Solicitor.

APPEAL OF MIDLAND CONSTRUCTORS, INC.

IBCA-272

Decided October 2, 1961

Contracts: Changes and Extras—Contracts: Interpretation

Under a contract clause providing for equitable adjustment for extra work, allowing actual necessary costs including use of equipment plus allowance of 15 percent for superintendence, general expense and profit, but excluding from actual necessary costs any allowance for office expenses, general superintendence, or other general expenses, the hourly wages and automobile rental for a general foreman, who was not in charge of all work under the contract, are allowable as direct costs of performing the extra work and are not costs of superintendence or other general expenses. Moreover, the doctrine of *contra proferentem* requires that any ambiguity in the language of such clause be construed against the Government as its author.

Contracts: Release

A contractor is barred from asserting a claim in excess of the amount reserved in the release on contract.

BOARD OF CONTRACT APPEALS

Midland Constructors, Inc., has filed a timely appeal from the findings of fact and decision of the contracting officer dated December 15,

⁶ A similarly worded provision in the 1946 Interior Department Appropriation Act, 1946 (59 Stat. 353), provided the basis for the opinion that the Secretary of the Interior could make and enforce regulations for the recreational use of the Lake Texoma Recreational Area, and for the safety and health of those who make use of it, under authority of the Act of August 25, 1916. (Solicitor's Opinion M-34644, *supra*, p 4.)

1960,¹ denying, in part, its claims for additional compensation in the amount of \$11,710.98.

The above-identified contract dated April 28, 1959, provided for the furnishing, performing, and completing the stringing of the conductors and overhead ground wires for the Fargo-Granite Falls 230-kilovolt transmission line, which extends from the Fargo substation in North Dakota to the Granite Falls substation in Minnesota. It was executed on U.S. Standard Form 23 (Revised March 1953) and incorporated the General Provisions of U.S. Standard Form 23A (March 1953). The contract price was estimated to be \$1,524,647.

Four claims for additional compensation, totaling \$13,413.22, were reserved by the appellant in the Release on Contract dated March 25, 1960, and are described therein as follows:

No. 1—Materials furnished per Invoice #5R-19-1-----	\$1,713.22
No. 2—Check locknuts on static clamps 114 miles-----	1,500.00
No. 3—Removing sleeves over State Road #27-----	5,200.00
No. 4—Additional Static Dead Ends-----	5,000.00

In the invoices that accompanied the three letters of the appellant to the Bureau of Reclamation (one dated August 15, 1960, and two dated August 22, 1960), it reduced the amounts of Claims Nos. 2 and 3 from \$1,500 and \$5,200, respectively, to \$1,222.02 and \$2,470.70, respectively, and increased the amount of Claim No. 4 from \$5,000 to \$6,305.04.

In his findings of fact and decision, the contracting officer summarized the results of his findings as follows:

Claim No.	Description	Amount Allowed
1	Furnishing materials to Government-----	(¹)
2	Checking nuts on overhead ground-wire assemblies-----	\$1,044.96
3	Removing and reinstalling conductors and overhead ground wires at highway crossing.	0
4	Furnishing and installing additional overhead ground-wire deadend assemblies.	3,812.16

¹ Previously resolved.

The contracting officer, in paragraph 6 of his findings, stated with respect to Claim No. 1 that:

This claim has been independently resolved and will not be considered in this findings of fact.

A hearing has not been requested, and the appeal is submitted on the record.

¹ The timeliness of the appeal was decided by the Board on May 3, 1961, when the Board denied the Government's motion to dismiss the appeal for failure to appeal timely and for failure to comply with 43 CFR 4.5(a). (68 I.D. 124, 61-1 BCA par. 3012.)

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CLAIM No. 2

CHECKING SUSPENSION ASSEMBLIES

This claim is in the amount of \$177.06 as the balance of additional compensation allegedly due the appellant for "checking overhead ground wire suspension assemblies" theretofore installed by its employees on "Type SH structures" on the transmission line here under consideration for the purpose of detecting loose nuts and "MF-type locknuts" requiring tightening.

As noted above, the appellant, in the release on contract, reserved a claim in the amount of \$1,500 for checking locknuts on static clamps on the transmission line a distance of 114 miles. In Invoice No. 5R-19-4, dated August 15, 1960, consisting of Parts I and II, submitted with the appellant's letter of the same date,² the appellant reduced the total amount of the claim to \$1,222.02. Part I of the invoice covers that portion of the claim "for checking towers 0/1 thru 50/3," and is in the amount of \$510.02. Part II of the invoice covers the remainder of the claim "for checking towers 50/4 thru 114/1," and is in the amount of \$712.

In his findings of fact and decision, the contracting officer found that the portion of the costs of the "inspection work ordered by the Government which was incurred in inspecting structures where no deficiencies were found on the overhead ground-wire suspension assemblies"³ is payable as extra work under the provisions of Paragraph 7 of the General Conditions of the specifications.

The said paragraph 7 provides, in pertinent part, as follows:

* * * Extra work and material will ordinarily be paid for at the lump-sum or unit price stated in the order. Whenever, in the judgment of the contracting officer, it is impracticable, because of the nature of the work or for any other reason to otherwise fix the price in the order, the extra work and material shall be paid for at the actual necessary cost as determined by the contracting officer, plus an allowance, not to exceed 15 percent of such actual necessary cost of the extra work and materials, for superintendence, general expense, and profit. The actual necessary cost will include all reasonable expenditures for material, labor (including compensation insurance and social security taxes), and supplies furnished by the contractor, and a reasonable allowance for the use of his plant and equipment, where required, but will in no case include any allowance for office expenses, general superintendence, or other general expenses.

² In this letter, the appellant stated in part that: "The claim is made up of two parts: (1) climbing towers 0/1 thru 50/3, and (2) climbing towers 50/4 thru 114/1. A separate crew was used to climb towers 0/1 thru 50/3 for which actual records are available. As those towers between 50/4 and 114/1 were checked at the same time as the regular cleanup was being performed, an estimated manhour figure was determined and used as a basis for actual costs."

³ This is the work covered by the claim for \$1,500 reserved in the release on contract and itemized in Invoice No. 5R-19-4 submitted by the appellant to the Bureau of Reclamation with its letter of August 15, 1960.

The contracting officer, in his findings of fact and decision, also found that the appellant's method of determining and allocating the costs of the additional work ordered by the Government was reasonable but that the inclusion, among the items of such costs, of the wages of a general foreman⁴ as well as the inclusion therein of his costs of transportation, are not properly a part of the actual costs involved and must be considered as included in the allowance provided for supervision in Paragraph 7 of the specifications. He, accordingly, found that only the sum of \$1,044.96 was properly allowable to the appellant.⁵

In its letter of February 10, 1961, the appellant requested the allowance of \$177.06 to cover the "charges for the general foreman" in the performance of the extra work here involved.⁶ This item of the claim represents the wages of this foreman and the costs of his transportation to and from the site of the work.

The issue presented by the instant claim is the narrow one as to whether the above-quoted language in Paragraph 7 of the General Conditions of the specifications warrants the inclusion, among the items of the costs of the additional work ordered by the Government, of the wages of the general foreman and of his costs of transportation.

In 1 *DICTIONARY OF OCCUPATIONAL TITLES* 603 (2d ed. 1949), published by the United States Department of Labor, the term "general foreman" is defined as one who locates and solves operating difficulties and renders technical advice to subordinates or superiors and directs observance of safety precautions by operating personnel.

In *Tobin v. Kansas Milling Co.*,⁷ the Court of Appeals for the Tenth Circuit quoted from a letter ruling of the Administrator of the Wage and Hour Division of the United States Department of Labor, dated November 1941, in which he stated:

The requirement of the Regulations [referring to the regulations promulgated by the Administrator which became effective October 24, 1940] are satisfied if an executive employee supervises one permanent employee and on fairly frequent occasions, as need arises, supervises additional temporary employees.

In that case the foreman of a flour elevator was in complete charge of the elevator operations, received a monthly salary, had authority to hire and fire, and was held to be exempt from the overtime provisions of the regulations.

⁴ The contracting officer stated: "However, the contractor has included wages of a general foreman who did not perform productive work and also the costs of his transportation (automobile) as part of the necessary costs. (The hiring of the general foreman is reported to have been required by union agreement.)"

⁵ This amount was arrived at by allowing \$420.24 on account of the items listed in Part I of the invoice and by allowing \$624.72 on account of the items listed in Part II thereof, thus resulting in the disallowance of the sum of \$177.06, which forms the basis of the instant claim.

⁶ The appellant's invoice would indicate that the work was performed by a working foreman and several linemen.

⁷ 195 F. 2d 282, 286 (1952).

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It was held in *Church of Jesus Christ v. Industrial Acc. Comm'n*,⁸ quoting in part from the syllabus, that:

Person having charge and control of men engaged in construction work, though he was subject to the advice and direction of the contractor and architect, held "general superintendent" within Workmen's Compensation Act * * *.

In the foregoing case the foreman was the only person supervising the building of the church. There was no one intervening between him and the owner or architect, neither of whom could properly be classed as a superintendent. Other cases in a line of similar decisions (construing the California Workmen's Compensation Act provisions for increased awards where the accident resulted from serious and wilful misconduct of executive, managing officer, or general superintendent) hold to the effect that it is the "investing of a supervisory employee with general discretionary powers of direction, and not the bestowal on him of the title 'foreman,' which determines whether he comes within the purview of section 4553 of the Labor Code".⁹

In defining the word "superintendence," BALLENTINE, LAW DICTIONARY WITH PRONUNCIATIONS 1252 (1948 ed.), quotes several authorities, as follows:

Webster defines the word as the "act of superintending; care and oversight for the purpose of direction, and with authority to direct. Synonyms: inspection; oversight; care; direction; control; guidance." Worcester defines it as "the act of superintending; oversight; superior care; direction; inspection." Roberts & Wallace on Duty and Liability of Employers says: "The word seems properly to imply the exercise of some authority or control over the person or thing subjected to oversight."

A more specific distinction between the meanings of "foreman" and "superintendent" is found in 40 WORDS AND PHRASES 752 (perm. ed. 1940):

The word "superintendent" implies a person exercising large executive powers, and does not include a mere foreman having direction of mechanics and other workmen engaged with him in the construction of a building * * *. Fournier v. Pike, 128 F. 991, 994.

In 40 WORDS AND PHRASES 202 (perm. ed. 1940, Supp. 1961), there is the following discussion:

"Superintendent", in statute authorizing service of summons on corporation by delivering copy to superintendent, has a meaning corresponding to "managing agent" in same statute, and both terms relate to a person possessing and exercising the right of general control, authority, judgment and discretion over corporation's business or affairs, either on an overall or part basis, i.e., every-

⁸ 260 Pac. 578 (Cal. 1927).

⁹ *Bechtel McCone Parsons Corp. v. Industrial Acc. Comm'n*, 153 P. 2d 331 (1944), and cases cited therein, also holding that a foreman whose authority was limited to the direction of a crew of men operating a crane, and who did not have general supervision over other operations, was not an executive or managing officer or general superintendent within the provisions of the Workmen's Compensation Act.

where or in a particular branch or district. *Carroll v. Wisconsin Power & Light Co., Wis., 79 N.W. 2d, 1, 3.*

Both "foreman" and "superintendence" have been compared with "inspection." An English authority, CRABB, ENGLISH SYNONYMS 452 (1945 ed.), thus distinguishes "superintendency:"

INSPECTION, SUPERINTENDENCY, OVERSIGHT. The office of looking into the conduct of others is expressed by the first two terms, but *inspection* comprehends little more than the preservation of good order; *superintendence* includes the arrangement of the whole. The monitor of a school has the *inspection* of his school-fellows, but the master has the *superintendence* of the school. The officers of an army *inspect* the men, to see that they observe all the rules that have been laid down for them; a general or superior officer has the *superintendence* of any military operation. Fidelity is peculiarly wanted in an *inspector*, judgment and experience in a superintendent * * *

Since it is obvious that the appellant's general foreman, as an hourly wage employee, whose hiring was required by the union agreement,¹⁰ was not in charge of all the appellant's operations under this contract of approximately \$1,524,647, it is even more plain that he could not possibly have been the general superintendent of all the company's operations.

Moreover, in construing the language of paragraph 7 of the General Conditions of the specifications the question of intent is posed. This paragraph is one devised, apparently, by the Bureau of Reclamation. It is similar in effect to a clause used by the National Park Service for a like purpose.¹¹

The purpose of paragraph 7 was undoubtedly that of excluding profit and costs of a general expense character which were not attributable solely to the extra work, except for the allowance of 15% to cover such items of indirect costs and profit.

Indirect costs should not be confused with *indirect or non-productive labor*. The Federal Procurement Regulations (Contract Cost Principles and Procedures, Subpart 1-15.202,¹² make the following cautionary observation (the same language appears in ASPR 15-202) :

Direct Costs

(a) A direct cost is any cost which can be identified specifically with a particular cost objective. Direct costs are not limited to items which are incorporated in the end product as material or labor. Costs identified specifically with the contract are direct costs of the contract and are to be charged directly thereto. * * *

¹⁰ See fn. 4, *supra*.

¹¹ This clause provides that the adjustment for extra work, if not agreed on in advance, shall be "(b) On the basis of the actual cost of the extra work (including the hire or rental of such plant as may be used exclusively for such extra work and including workman's compensation insurance, social security and unemployment and all applicable taxes, *but excluding overhead*), plus fifteen (15) percent of that cost to cover profit and all indirect charges against such extra work." *Seal and Company, IBCA-181* (December 23, 1960), 67 I.D. 435-37, 61 BCA par. 2887, 3 Gov. Contr. par. 39.

¹² 41 CFR 1-15.202.

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In any event, to the extent that the above-quoted language of paragraph 7 may not be clear, or may be ambiguous and the intent of the parties does not otherwise appear, it will be construed in favor of the party who did not prepare it.¹³

The transportation charges of the general foreman, in the form of an equipment rental of \$1.25 per hour for an automobile, are allowed as a necessary direct cost of performing his work, and as being reasonable in amount the very nature of his duties would require him to travel expeditiously from one site of the work to another in order to supervise the work.

Accordingly, the appeal as to Claim No. 2 is sustained.

CLAIM NO. 3 REMOVING AND REINSTALLING CONDUCTORS AND OVERHEAD GROUNDWIRES AT HIGHWAY CROSSING

This claim is for the sum of \$2,470.70 on account of the costs incurred in removing two splicing sleeves from two one-half inch overhead groundwires, three splicing sleeves from three conductors and two and one-half spans of overhead groundwires and conductors from the transmission line span crossing Minnesota State Highway No. 27, previously installed by the appellant, as well as reinstalling conductors, overhead groundwires, and splicing sleeves in such manner so as to insure that splicing sleeves did not occur in a crossing span or in an area adjacent to an important highway, as required by Paragraphs 33 and 35 of the specifications.

The appellant, in the release on contract, reserved this claim in the amount of \$5,200. In Invoice No. 5R-19-5, dated August 15, 1960, consisting of Parts I and II, submitted with the appellant's letter of August 22, 1960, the appellant reduced the total amount of the claim to \$2,470.70.

The contracting officer, in his findings of fact and decision, found that this claim is for costs incurred "in correcting work that did not conform to requirements of the specifications."

In *Weldfab, Inc.*,¹⁴ the Board quoted with approval the following statements from *Duncan Construction Company*:¹⁵

In an appeal attacking the validity of a finding of fact or decision by a contracting officer, not patently erroneous, it is incumbent upon a contractor who advances a claim against the Government that was denied by such finding or decision to come forward with evidence showing error therein, and in the absence

¹³ *Framlau Corporation*, IBCA-228 (August 18, 1961), citing *Peter Kiewit Sons' Company, et al. v. United States*, 109 Ct. Cl. 390, 418 (1947). See also *United States v. Spearin*, 248 U.S. 132, 136 (1918); *Orino v. United States*, 111 Ct. Cl. 491, 518-19 (1948).

¹⁴ IBCA-268 (August 11, 1961).

¹⁵ IBCA-91 (April 2, 1958), 65 I.D. 135, 138, 58-1 BCA par. 1675. To the same effect, *Wickes Engineering and Construction Co.*, IBCA-191 (November 30, 1960), 61-1 BCA par. 2372.

of such evidence this Board cannot properly overrule the decision of the contracting officer. * * *

The burden of this appeal is upon the contractor's shoulders, and that burden calls for evidence on the contractor's side to show that the action taken by the contracting officer was erroneous; and it is not sufficient merely for the contractor to say that the action was not proper, for such a contention should be supported by proof giving some explanation of just why it was an error. In the absence of such proof the Board must accept the record, together with any testimony submitted by the Government, as being correct, unless it, on its face, shows error or that it is unbelievable.

On the record, the appellant has failed to sustain its burden of proof, by a preponderance of the evidence, that the finding of the contracting officer in respect to this claim was erroneous; and there is no patent error in such finding. Hence, the Board must accept such finding as being correct.¹⁶

CLAIM No. 4

FURNISHING AND INSTALLING ADDITIONAL OVERHEAD GROUNDWIRE DEAD-END ASSEMBLIES

This claim is for the sum of \$2,492.88 on account of furnishing and installing 140 dead ends, including sagging, which the appellant contends are in addition to the dead ends and sagging, as required by the specifications.

The appellant, in the release on contract, reserved this claim in the amount of \$5,000. In Invoice No. 5R-19-6, dated August 22, 1960, consisting of Parts I and II, submitted with the appellant's letter of August 22, 1960, it increased the total amount of this claim to \$6,305.04. The claim, however, must be treated as one in the amount of \$5,000, as the appellant is bound by the amount specified in the release on contract, in view of the reservation of the claim in a specific amount.¹⁷

The contracting officer, in his findings of fact and decision, determined that the appellant should be compensated for extra costs incurred in being required by the Government to install a greater number of overhead ground-wire dead ends than the number thereof that could have been ascertained from the information made available to it prior to the submission of its bid. Although the appellant installed 184 dead ends, the contracting officer found that it could have determined from the information available to it that 96 of them would have been required to be installed. He, therefore, found that the appellant should be compensated for the installation of 88 dead ends at the rate of \$43.32 per dead end, or in the total amount of

¹⁶ See authorities cited in fn. 4 of *Weldfab, Inc.*, fn. 14, *supra*.

¹⁷ *A. L. Coupe Constr. Co. v. United States*, 134 Ct. Cl. 392, 399 (1956); *Shepherd v. United States*, 125 Ct. Cl. 724, 741 (1953); *Bein v. United States*, 101 Ct. Cl. 144, 160 (1943); *Eastern Contracting Co. v. United States*, 97 Ct. Cl. 341, 355 (1942); *P. J. Carlin Constr. Co. v. United States*, 92 Ct. Cl. 280, 304-305 (1940).

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\$3,812.16.¹⁸ This results in a reduction of \$1.72 in the unit price for disallowance of the general foreman's wages and equipment, or a total of \$151.36.

The authorities cited in support of the denial of Claim No. 3 are cogent reasons for the denial of this claim. Therefore, it is rejected except for the charges for wages and transportation of the general foreman (denied by the contracting officer) to the extent that they are applicable to the installation of 88 dead ends. The appeal is sustained as to such charges in the amount of \$151.36, on the basis of our decision as to Claim No. 2.

CONCLUSION

The appeal is sustained as to Claim No. 2 in the amount of \$177.06.

Claim No. 3 is denied in its entirety.

Claim No. 4 is sustained to the extent of \$151.36.

THOMAS M. DURSTON, *Member*.

I concur:

PAUL H. GANTT, *Chairman*.

J. PENROD TOLES

A-28534

Decided October 16, 1961

Oil and Gas Leases: 640-acre Limitation—Oil and Gas Leases: Lands Subject to

Land within an outstanding oil and gas lease is not available for leasing and application which covers less than 640 acres of land exclusive of such land and which does not include adjoining land available for leasing should be rejected.

Oil and Gas Leases: 640-acre Limitation—Oil and Gas Leases: Cancellation

An oil and gas lease issued in violation of the 640-acre limitation rule is properly canceled when a subsequent proper application for the same land was filed before the lease was issued.

Oil and Gas Leases: Cancellation—Oil and Gas Leases: Generally

The cancellation of an oil and gas lease pending on appeal after the passage of the act of September 21, 1959, protecting the rights of bona fide purchasers of oil and gas leases must be set aside where the record shows that there is pending an assignment of the lease to a person who the lessee asserts is a bona fide purchaser, until the validity of the assignment, the status of the assignee as a bona fide purchaser, and the applicability of the act of September 21, 1959, as amended by the act of September 2, 1960, have been determined.

¹⁸ The contracting officer considered the unit costs for furnishing and installing the dead ends and the extra sagging as reasonable except the wages of the general foreman, who failed to perform any productive work, as well as his "costs of transportation."

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

J. Penrod Toles has appealed to the Secretary of the Interior from a decision dated May 26, 1960, of the Director of the Bureau of Land Management which affirmed a decision of the land office at Santa Fe dated October 30, 1959, canceling his noncompetitive oil and gas lease New Mexico 048273 as to the SE $\frac{1}{4}$ sec. 17, T. 16 S., R. 27 E., N.M.P.M., New Mexico.

Toles' application for a lease, filed on July 7, 1958, covered exactly 640 acres of land in four tracts. Several minutes later, the Southwestern Petroleum Corporation filed application New Mexico 048299, covering 2,560 acres and conflicting with Toles' application so far as here material as to the same SE $\frac{1}{4}$ sec. 17. Two of the tracts, comprising 400 acres, were in outstanding oil and gas leases on the date Toles filed. In a decision dated January 27, 1959, the manager rejected Toles' application as to the 400 acres and issued a lease effective February 1, 1959, as to the remaining 240 acres, described as the SE $\frac{1}{4}$ sec. 17 and the E $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 15, same township and range.

Shortly thereafter, on March 5, 1959, Ralph Lowe filed 3 copies of an assignment of Toles' lease, executed February 10, 1959, by the appellant and his wife to him, together with a letter asking that the assignment be approved.

On August 28, 1959, the Southwestern Petroleum Corporation withdrew its application as to all the land covered by the application except the SE $\frac{1}{4}$ sec. 17, and a lease was issued to it effective October 1, 1959, for that tract. When the manager became aware of the conflict between the two leases as to the SE $\frac{1}{4}$ sec. 17, he first canceled Southwestern Petroleum's lease in its entirety in a decision dated October 19, 1959, and then in a decision dated November 2, 1959, modified that decision to leave the lease offer in effect.

He then issued his decision of October 30, 1959, which, as amended on December 7, 1959, canceled Toles' lease as to the SE $\frac{1}{4}$ sec. 17 on the ground that the application covered less than 640 acres of land available for leasing and that other land available for leasing, namely the E $\frac{1}{2}$ sec. 20, N $\frac{1}{2}$ sec. 28, NE $\frac{1}{4}$ sec. 29, same township and range, adjoining the SE $\frac{1}{4}$ sec. 17 was then available for leasing.

On appeal the Director affirmed the manager's decision, holding that Toles' lease was issued in violation of departmental regulation 43 CFR 192.42(d) and that it must be canceled where a subsequent valid application for the same land had been filed and was pending when his lease was issued.

On appeal, Toles contends that his offer was for 640 acres and complied with the applicable regulation; that there is no authority to cancel his lease once it had been issued; that the lease had been sold to a bona fide purchaser; and that if there is authority to can-

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cel a lease, it is discretionary, and it should not be exercised where the lease has been conveyed to a bona fide purchaser.

Except for the fact that Toles has assigned his lease and that Congress has amended the Mineral Leasing Act in particulars which will be discussed below, the Director's decision would have been correct.

At the time Toles filed his offer, the pertinent regulation read:

Each offer * * * may not be for less than 640 acres except in any one of the following instances:

* * * * *

(2) Where the land is surrounded by lands not available under the act. * * *. 43 CFR 192.42(d), as amended by circular 1977, 22 F.R. 3072.¹

Although Toles' application covered exactly 640 acres, 400 of them were in outstanding leases on the date he filed and could not be counted towards the necessary 640 acres, for only lands that are available for leasing may be considered. *R. S. Prows*, 66 I.D. 19 (1959); *Janis M. Koslosky*, 66 I.D. 384 (1959); *Duncan Miller*, A-28481 November 28, 1960). An offer for less than 640 acres is valid only if it comes within one of the exceptions set out in the regulation. As the Director pointed out, although lands adjoining the SE $\frac{1}{4}$ sec. 17 were covered by a prior application, they were still available for leasing and should have been included in Toles' application. *F. W. C. Boesche*, A-27977 (August 5, 1959);² *Natalie Z. Shell*, 62 I.D. 417 (1955). The fact that at the time Toles filed his application the regulation read "not available under the act" instead of "not available for leasing under the act" (emphasis added) as it did before (43 CFR, 1954 Rev., 192.42(d) (2) and after (43 CFR, 1959 Supp., 192.42(d)) he filed did not alter its meaning. *Violet Gorrensens*, A-28289 (June 8, 1960).

Accordingly, the appellant's application should have been rejected as to the SE $\frac{1}{4}$ sec. 17 and a lease should have been issued to the Southwestern Petroleum Corporation, if its application was in all respects regular. In identical circumstances it has been held that section 17 of the Mineral Leasing Act, as amended (30 U.S.C. 1958 ed., sec. 226), imposes upon the Secretary a mandatory duty to lease public land to the first qualified applicant who files a proper application for it if a lease is to be issued to anyone and a lease issued to an applicant in violation of another's statutory preference right contravenes the statute and the departmental regulation and must be canceled. *F. W. C. Boesche, supra*; *R. S. Prows, supra*; *West Central Corporation*, A-28523 (February 2, 1961).

¹ Now 43 CFR, 1960 Supp., 192.42(d) as amended without material change.

² Affirmed *Penelon Boesche, Administrator of the Estate of F. W. C. Boesche, Deceased v. Fred A. Seaton, Secretary of the Interior*, Civil No. 2463-59, United States District Court for the District of Columbia (November 23, 1960). Appeal pending D. C. Cir.

The appellant urges that the Secretary has no authority to cancel an oil and gas lease, citing *Pan American Petroleum Corporation v. Ed Pierson et al.*, 284 F. 2d 649 (10th Cir. 1960); petition for rehearing denied, *id.*, 656, in which the court enjoined the Supervisor for the State of Wyoming and the managers of several land offices from proceeding with an administrative action for the cancellation of oil and gas leases held by Pan American on the ground that Pan American's predecessors in title had wilfully, falsely and fraudulently obtained the issuance of the leases by devices which enabled them to obtain leases covering acreage in excess of the amount permitted by statute and regulations. The court held

* * * we conclude that the defendant officers and their superior, the Secretary of the Interior, are without statutory authority, either express or implied, to cancel or annul federal oil and gas leases by administrative proceedings taken after the issuance of such leases and because of any conduct of a lessee which preceded such issuance.³

The Department has long held that the Secretary has authority to cancel leases which were issued as a result of fraud committed by the lessee prior to issuance of a lease, by mistake, or in violation of the Mineral Leasing Act or regulations issued under the act. *R. S. Prows*, *supra*, and cases cited. In *McKay v. Wahlenmaier*, 226 F. 2d 35 (D.C. Cir. 1955), the court held that the Secretary must cancel a lease issued in violation of a departmental regulation. Cf. *McKenna v. Seaton*, 259 F. 2d 780 (D.C. Cir. 1958); cert. denied, 358 U.S. 835 (1958).

In the *Pan American* case the court was concerned with the question of the authority of the Secretary to cancel a lease for fraud in its procurement and the modification of the language cited in the footnote above indicates that the decision is limited to that particular situation.⁴ In this appeal we are concerned with a lease issued in violation of a departmental regulation to the detriment of a properly qualified junior applicant. Because the court has apparently restricted its decision in the *Pan American* case to leases involving fraud in the procurement, the Department does not interpret it as conflicting with its rulings that it has authority to cancel a lease in other circumstances and will adhere to its consistent and long-established practice.

Finally the appellant insists that his lease should not be canceled because he has assigned it to a bona fide purchaser and that if the

³ As originally issued the decision read "because of actions which preceded such issuance." but the court deleted this clause and substituted the one quoted.

⁴ This is made more explicit by the language used by the court in denying the petition for reconsideration. The court said:

"This case involves the administrative cancellation of an oil and gas lease for fraud by lessees in procurement. The comments of counsel relating to the authority of the Secretary to cancel for administrative errors or breaches of lease provisions are beside the point and merit no consideration. We adhere to our view that the Secretary and the defendant officers are without authority to cancel an oil and gas lease for fraud of a lessee precedent to lease issuance."

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Department cancels a lease held by a bona fide purchaser it will cast such doubt upon the title to so many oil and gas leases that the orderly development of the oil and gas deposits in the public lands would be seriously impeded.

The problem raised by the transfer to bona fide purchasers of interests in oil and gas leases which are subject to cancellation or forfeiture was examined by the Congress during the past several years. Its consideration culminated in the passage of the act of September 21, 1959 (73 Stat. 571), which amended section 27 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 184), to provide for the protection of the interest of a bona fide purchaser of a lease subject to cancellation or forfeiture for violation of the provisions of the act. A year later, this provision was amended along with others by the act of September 2, 1960 (30 U.S.C., 1958 ed., Supp. II, sec. 184(h) (2), (i)), and now provides in pertinent part:

(h) * * *

(2) The right to cancel or forfeit for violation of any of the provisions of this Act shall not apply so as to affect adversely the title or interest of a bona fide purchaser of any lease, interest in a lease, option to acquire a lease or an interest therein, or permit which lease, interest, option, or permit was acquired and is held by a qualified person, association, or corporation in conformity with those provisions, even though the holdings of the person, association, or corporation from which the lease, interest, option, or permit was acquired, or of his predecessor in title (including the original lessee of the United States) may have been canceled or forfeited or may be or may have been subject to cancellation or forfeiture for any such violation. * * *

(i) Effective September 21, 1959, any person, association, or corporation who is a party to any proceeding with respect to a violation of any provision of this Act, whether initiated prior to said date or thereafter, shall have the right to be dismissed promptly as such a party upon showing that he holds and acquired as a bona fide purchaser the interest involving him as such a party without violating any provisions of this Act. No hearing upon any such showing shall be required unless the Secretary presents prima facie evidence indicating a possible violation of the Mineral Leasing Act on the part of the alleged bona fide purchaser.

The pertinent regulation provides:

The act of September 21, 1959 (73 Stat. 571; Public Law 86-294), amends section 27 of the Mineral Leasing Act and provides that the right of cancellation or forfeiture for violation of any of the provisions of the act shall not apply so as to adversely affect the title or interest of a bona fide purchaser of any lease, option for a lease, or interest in a lease acquired in conformity with the acreage limitations of the act from anyone whose holdings, or the holdings of a predecessor in title, including the original lessee, may have been cancelled or forfeited, or may be subject to cancellation or forfeiture for any such violation. The holder of a lease or of an interest therein whose lease or interest is or may be adversely affected by any cancellation or forfeiture action pursuant to any provision of the act shall be notified of the proposed action and advised that the protection and benefits of Public Law 86-294 may be obtained by submitting

proof of bona fide purchase of the lease or interest therein within 60 days from the date of receipt of such notice. 43 CFR 191.15(a), Circular 2042, 25 F.R. 4081.

Neither the statute nor the regulation is very clear as to whether it applies to bona fide purchasers of leases issued in violation or disregard of other than the acreage limitation provisions of the Mineral Leasing Act. The legislative history of the act shows an exclusive preoccupation with the problem of leases issued in violation of the acreage limitations and subsequently transferred to bona fide purchasers. However, the statutory language broadly refers to leases issued in violation of any provision of the act, and the Congressional committee reports on the 1959 legislation do advert to other violations of the act. Thus both the House and Senate Committee on Interior and Insular Affairs referred to the hesitancy of oil operators to invest in the development of the oil and gas resources of the public domain because of the danger that a prior holder in the chain of title "may have been in violation of the acreage limitation or other provisions of the act" and that the legislation would protect bona fide purchasers from the consequences "of a possible violation of some provision of the leasing act by a predecessor in title." Sen. Rep. 754 and House Rep. 1062, 86th Cong., 1st sess.

In the absence of restrictive language in the statute clearly limiting the scope of the bona fide purchaser provisions, I see no basis for giving them a constrictive interpretation. I conclude therefore that they are applicable here.

The last sentence of the Department's regulation requires that a holder of a lease or an interest in a lease must be notified of a proposed cancellation and be given an opportunity to avail himself of the benefits of the statute. The appellant contends that he has assigned the lease to a bona fide purchaser and the record contains the assignment from him to Ralph Lowe, dated February 10, 1959, and filed on March 5, 1959. The assignment has neither been approved nor disapproved. If the assignment is proper in all respects and the assignee is a bona fide purchaser, Lowe must be allowed to take advantage of the provisions of the statute and regulation.

Thus, until the validity of the assignment has been determined and, notice, if necessary, has been given to the assignee of the proposed action, the cancellation of Toles' lease is premature. Because these matters can best be processed initially by the land office, the case ought to be returned there for initial consideration.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Director of the Bureau of

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Land Management is vacated and the case remanded for further proceedings consistent herewith.

EDWARD W. FISHER,
Deputy Solicitor.

RICHARD K. TODD ET AL.

A-28090, A-28311, A-28374 *Decided October 30, 1961*

Oil and Gas Leases: Discretion to Lease

The 1946 amendment to section 17 of the Mineral Leasing Act did not deprive the Secretary of the Interior of his authority to decide in his discretion whether it is in the public interest to issue oil and gas leases for certain areas of the public lands.

Oil and Gas Leases: Applications—Oil and Gas Leases: Discretion to Lease

The Secretary of the Interior can reject an offer to lease for oil and gas when he determines that such action is in the public interest even though the land applied for may have been open to oil and gas leasing when the offer was filed.

Oil and Gas Leases: Discretion to Lease—Withdrawals and Reservations: Generally—Alaska: Oil and Gas Leases

The agreement signed by the Secretary on July 24, 1958, closing part of the Kenai National Moose Range to oil and gas leasing was not issued pursuant to the Secretary's authority to withdraw public lands but in the exercise of his discretionary authority to issue oil and gas leases.

Administrative Procedure Act: Rule Making

The provisions of section 4 of the Administrative Procedure Act relating to rule making do not apply to regulations issued by the Secretary governing the issuance of oil and gas leases on the Kenai National Moose Range, because the regulation involves the use of public property and matters affecting public property are expressly excepted from the provisions governing rule making in section 4 of the Administrative Procedure Act.

Administrative Procedure Act: Hearings

The provisions of section 5 of the Administrative Procedure Act relating to hearings do not apply to offers to lease public land for oil and gas because a hearing is not required by the pertinent statute, the Mineral Leasing Act, nor by the due process provision of the Constitution.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Richard K. Todd and others¹ have appealed to the Secretary of the Interior from several decisions dated March 25, 1959, October 22, 1959, or December 29, 1959, respectively, of the Director or the Acting Director of the Bureau of Land Management which affirmed the rejection of their offers.

¹ See Appendix for the names of the appellants and the serial numbers of their offers.

tion by the manager of the Anchorage land office of their respective noncompetitive offers to lease for oil and gas certain lands within the boundaries of the Kenai National Moose Range on the Kenai Peninsula in Alaska because the lands applied for are within the portion of the moose range which the Secretary has decided to close to oil and gas leasing. The offers were filed pursuant to section 17 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 226). The Acting Director held that the determination of whether to issue a lease for oil and gas lies within the discretion of the Secretary and that, if the Secretary determines in his discretion not to lease certain land, offers to lease such land must be rejected.

The Kenai National Moose Range was established by Executive Order No. 8979, dated December 16, 1941 (6 F.R. 6471), which provided in pertinent part:

By virtue of the authority vested in me as President of the United States, it is ordered that, for the purpose of protecting the natural breeding and feeding range of the giant Kenai moose on the Kenai Peninsula, Alaska, which in this area presents a unique wildlife feature and an unusual opportunity for the study in its natural environment of the practical management of a big game species that has considerable local economic value, all of the hereinafter-described areas of land and water of the United States lying on the northwest portion of the said Kenai Peninsula, be, and they are hereby, subject to valid existing rights, withdrawn and reserved for the use of the Department of the Interior and the Alaska Game Commission as a refuge and breeding ground for moose for carrying out the purposes of the Alaska Game Law of January 13, 1925, 43 Stat. 739, U.S.C., title 48, secs. 192-211, as amended.

* * * * *

The order went on to state that except for a small strip of land not material here none of the land described "shall be subject to settlement, location, sale or entry, or other disposition," that the General Land Office (now Bureau of Land Management) retained primary jurisdiction over the lands, and that the order did not "prohibit the hunting or taking of moose and other game animals and game birds * * *."

The moose range lies south of Anchorage and encompasses an area of approximately 2,000,000 acres in a roughly rectangular shape extending up to 125 miles from north to south and up to 70 miles from east to west.

In the most recent revision of the departmental regulation relating to oil and gas leasing of wildlife refuge and game range lands (43 CFR, 1959 Supp., 192.9), the Department, for purpose of controlling the issuance of oil and gas leases, divided the public lands withdrawn for wildlife purposes into four classes. One of these is "Alaska wildlife areas," which are defined as "areas in Alaska created by a withdrawal of public lands for the management of natural wildlife resources and administered by the United States Fish and Wildlife

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Service" (*id.*, 192.9(a)(4)). The moose range falls into this class. The regulation further provides that

As to game range lands and Alaska wildlife areas, representatives of the appropriate office of the Bureau of Land Management and the United States Fish and Wildlife Service will confer for the purpose of entering into an agreement specifying those lands which shall not be subject to oil and gas leasing. * * * *Id.*, 192.9(b)(3).

On July 24, 1958, the Secretary signed an agreement² reached by these agencies which, roughly, opened the northern half of the range and closed the southern half to oil and gas leasing "because such activities would be incompatible with management thereof for wildlife purposes."

The manager and Acting Director based their decisions upon this directive and indeed, if it is valid, the offers must be rejected. In their appeals the several appellants attack it on a variety of grounds.

One ground common to almost all the appeals is the contention that the Secretary has no discretion in determining whether to lease public lands not withdrawn from leasing by the Mineral Leasing Act, as amended, but that he is under a mandatory duty to issue a lease to the first person filing a proper application who is qualified to hold a lease under the act. Stated conversely, the contention is that upon the filing of their offers the appellants acquired a vested right to have leases issued to them, since the lands applied for were then open to leasing, and they could not be deprived of this right by any subsequent action of the Secretary, to wit, the adoption of the July 24, 1958, agreement. (The appellants' offers were all filed prior to that date.)

In the recent case of *Haley v. Seaton*, 281 F.2d 620 (D.C. Cir. 1960), in which the identical argument was raised, the court rejected it, holding:

We are of the opinion, for reasons that we shall presently undertake to state, that the Secretary of the Interior had discretion to accept or reject Haley's applications for leases. If that conclusion is sound, then it must necessarily follow that the mere applications for leases created no vested rights in Haley.

As originally enacted, the Mineral Leasing Act of 1920 (§ 17) provided for leases only on "deposits of oil or gas situated within the known geologic structure of a producing oil or gas field * * *." However, § 13 of that Act authorized the Secretary of the Interior to issue an exclusive prospecting permit on land not within any known geological structure.

Section 13 of the Mineral Leasing Act was amended by the Act of August 21, 1935, 49 Stat. 674, to provide:

"That the Secretary of the Interior is hereby authorized, and directed, under such necessary and proper rules and regulations as he may prescribe, to grant to any applicant qualified under this Act a prospecting permit, * * * *Provided*, That said application was filed ninety days prior to the effective date of this amendatory Act. * * * *Provided further*, That any application for any prospect-

² Published in the Federal Register on August 2, 1958 (23 F.R. 5883).

ing permit filed after ninety days prior to the effective date of this amendatory Act shall be considered as an application for lease under section 17 hereof: * * *."

Section 17 of the Mineral Leasing Act provided "that all unappropriated deposits of oil or gas situated within the known geologic structure of a producing oil or gas field and the unentered lands containing the same * * * *may be leased* by the Secretary of the Interior * * *." (Emphasis ours.)

The Act of August 21, 1935, also amended § 17 of the Mineral Leasing Act to read, so far as here pertinent, as follows:

"Sec. 17. All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits, except as herein otherwise provided, *may be leased by the Secretary of the Interior* after the effective date of this amendatory Act, to the highest responsible qualified bidder by competitive bidding under general regulations. * * * *Provided further*, That the person first making application for the lease of any lands not within any known geologic structure of a producing oil or gas field who is qualified to hold a lease under this Act, including applicants for permits whose applications were filed after ninety days prior to the effective date of this amendatory Act shall be entitled to a preference right over others to a lease of such lands without competitive bidding * * *." (Emphasis ours.)

Section 17 of the Mineral Leasing Act was again amended by the Act of August 8, 1946, 60 Stat. 950, to read, so far as here pertinent, as follows:

"Sec. 17. All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits *may be leased by the Secretary of the Interior*. When the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible qualified bidder by competitive bidding under general regulations, * * *. When the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this Act shall be entitled to a lease of such lands without competitive bidding. * * *." (Emphasis ours.)

It is significant that the phrase "may be leased by the Secretary of the Interior" in § 17 of the original Mineral Leasing Act was carried forward without change in the Amendment of 1935 and the Amendment of 1946, indicating an intent to continue to give the Secretary of the Interior discretionary power, rather than a positive mandate to lease.

It was authoritatively settled that an application for a prospecting permit under § 13, *supra*, as originally enacted, created no vested right in the applicant.¹⁰

The court, in *United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 418, 419, 51 S. Ct. 502, 504, 75 L. Ed. 1148, held that the provisions of the Mineral Leasing Act plainly indicated "that Congress held in mind the distinction between a positive mandate to the Secretary and permission to take certain action in his discretion. Also, the difference between applicants for mere privileges and those persons who, because of expenditures, or otherwise, deserved special consideration" and "that under that Act, [1920] the granting of a prospecting permit for oil and gas is discretionary with the Secretary of the Interior and any application may be granted or denied, * * *."

Prior to the amendment of § 17 by the Act of August 8, 1946, this court had held that the Secretary of the Interior had discretionary power to accept or reject an application for a noncompetitive oil and gas lease under § 17.¹¹

¹⁰ *Wilbur v. United States*, 60 App. D.C. 11, 46 F. 2d 217, affirmed *United States, ex rel. McLennan v. Wilbur*, 283 U.S. 414, 415, 51 S. Ct. 502, 75 L. Ed. 1148.

¹¹ *Wann v. Ickes*, 67 App. D.C. 291, 92 F. 2d 215, 217; *United States ex rel. Roughton v. Ickes*, 69 App. D.C. 324, 101 F. 2d 248, 251; *Dunn v. Ickes*, 72 App. D.C. 325, 115 F. 2d 36, 37, certiorari denied 311 U.S. 698, 61 S. Ct. 137, 85 L. Ed. 452.

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This court, in *United States ex rel. Jordan v. Ickes*, 79 App. D.C. 114, 143 F. 2d 152, certiorari denied 320 U.S. 801, 64 S. Ct. 432, 88 L. Ed. 484; 323 U.S. 759, 65 S. Ct. 93, 89 L. Ed. 608, held that it was not the intent of Congress by the amendatory Act of August 21, 1935, to deprive the Secretary of the Interior of such discretion accorded him under the original Act, except as to a very limited group of applications filed 90 days prior to the effective date of the amendment.

We are of the opinion that the 1946 amendment in nowise limited such power in the Secretary of the Interior and continued his discretionary power either to grant or reject applications for leases. As observed above, the phrase in § 17 of the Mineral Leasing Act of 1920, as originally enacted, reading "may be leased by the Secretary of the Interior" was not changed by the Amendment of August 8, 1946. It was carried into the amendatory Act. The provision for the leasing of lands within a known geological structure and lands not within any known geological structure applies only to lands "to be leased," plainly implying that the Secretary of the Interior was to determine what lands were to be leased. Accordingly, we conclude that the acceptance or rejection of the applications to lease here involved was a matter resting within the discretion of the Secretary of the Interior. (Pp. 624-25.)

Therefore, I conclude that the 1946 amendment to section 17 of the Mineral Leasing Act did not deprive the Secretary of his discretionary authority over the issuance of oil and gas leases under the Mineral Leasing Act, as amended.

In one form or another, most of the appellants contend that the Secretary lacks authority to withdraw from mineral leasing large areas of public lands. They assert, as a subsidiary to this argument, that in withdrawing part of the moose range from leasing the Secretary did not follow the procedure prescribed in his regulations for making withdrawals.

The short answer to these assertions is that neither in the agreement of July 24, 1958, *supra*, nor in the regulation pursuant to which the agreement was adopted did the Secretary purport to exercise his authority to withdraw land. Although the Secretary possesses and has long exercised broad authority to withdraw public lands, he felt it desirable a number of years ago to formalize his authority by an express delegation from the President. *Solicitor's opinion*, 57 I.D. 331 (1941). Executive orders of delegation were issued, the latest being Executive Order No. 10355 of May 26, 1952 (17 F.R. 4831). Section 1 of this order specifies that all orders issued by the Secretary under authority of the order "shall be designated as public land orders." In accordance with this requirement orders of withdrawal issued by the Secretary have been designated and numbered as public land orders. See Appendix B to Chapter 1 of 43 CFR, 1954 ed., and 43 CFR, 1959 Supp. Neither the agreement of July 24, 1958, nor 43 CFR, 1959 Supp., 192.9 is designated as a public land order or recites as authority Executive Order No. 10355. Consequently it is

plain that the Secretary did not purport to withdraw land under the authority of that order.

Aside from Executive Order No. 10355 the Secretary has only limited statutory authority to withdraw public lands, e.g., 43 U.S.C., 1958 ed., sec. 300 (stock-driveaway withdrawals), and 43 U.S.C., 1958 ed., sec. 416 (reclamation withdrawals). To my knowledge he has never asserted that he had authority under the Mineral Leasing Act to withdraw land from leasing.

Finally, neither the agreement of July 24, 1958, nor the regulation is couched in the familiar language of withdrawal, language that is used again and again in public land orders and other statutory withdrawals. Certainly the Secretary would not have eschewed the use of such familiar language had he intended to make a withdrawal.

In adopting the agreement of July 24, 1958, the Secretary was simply exercising in a formal manner his discretionary authority over issuing noncompetitive leases under section 17 of the Mineral Leasing Act. Because the effect upon oil and gas applicants of the exercise of this authority is the same as a withdrawal of land, the appellants have confused the two authorities together. But the source of authority does not change because of its effect. Stripped of all authority to withdraw lands, the Secretary would still have his discretionary authority to refuse to issue leases where he thinks issuance would not be in the public interest.

The formal exercise by the Secretary of his discretionary authority is nothing new in the administration of the Mineral Leasing Act. Thus, on February 6, 1939, the Acting Secretary, for the purpose of protecting and conserving potash deposits, ordered that "until further notice, no lease under the oil and gas provisions of * * * [the Mineral Leasing Act] will be issued for the following-described lands [in New Mexico], and no application for oil and gas lease will be accepted, nor will any rights be acquired by the filing of an application therefor * * *" (4 F.R. 1012). Again, in a memorandum dated April 18, 1942, to the Commissioner of the General Land Office, the Department adopted the policy of not issuing oil and gas leases in the Ivanpah Valley, California. See *Marie E. Tuttle et al.*, A-27481 (January 28, 1958). And, on January 27, 1953, the Department issued Order No. 2714 (18 F.R. 700) declaring that "until further notice, no oil and gas lease under the Mineral Leasing Act * * *, shall be issued" for described wild areas in the Los Padres National Forest, California, and the Santa Fe National Forest, New Mexico. The area comprised wilderness areas. See *Cecil H. Phillips et al.*, fn. 3, *supra*. These formal actions did not purport to be and did not constitute withdrawals of land. They were merely formalized exercises of discretion, just as the agreement of July 24, 1958, is.

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Another argument offered by appellants is that the Secretary must issue them leases because at the date their offers were filed the lands applied for were open to oil and gas leasing under the pertinent statute and regulation. The facts are undisputed. The Mineral Leasing Act does not prohibit leasing within a moose range. The pertinent regulation, until its amendment in January 1958, permitted oil and gas leasing of lands in wildlife refuges under certain conditions (43 CFR, 1954 ed., sec. 192.9) and would not necessarily have prevented the issuance of leases to appellants.

This is merely another facet of the contention that an applicant for an oil and gas lease acquires some right to a lease merely by filing his application. The contention has already been answered, but it may be observed here that the effect of the contention would be that once an application has been filed for land open to leasing the Secretary loses his discretion to determine whether a lease should be issued. He could only exercise his discretion prior to the filing of an application. With the thousands of acres of public land open to leasing, the appellants are asking the Secretary to do the impossible, i.e., make a determination in advance whether any land should not be leased. Not only would this cast an enormous initial burden upon the Secretary but it would freeze a determination by him once an application is filed, preventing him from changing a determination on the basis of changing circumstances occurring after the filing of an application. Indeed, even if circumstances had changed prior to the filing of the application but a final determination of policy or the formalizing of a final determination had not been made prior to the filing, the hands of the Secretary would be tied. Such a conclusion has no support in law or in reason.³

Some of the appellants raise the claim of equities, that it is unfair to reject applications on the basis of a determination made 4 years after the applications were filed. In *Dunn v. Ickes, supra*, the plaintiff asked the court to order the Secretary to act on his application. Refusing to do so, the court said: "It cannot be doubted that under many circumstances withholding action on such applications for a rather extended period would be eminently proper, if not essential to wise administration." 115 F.2d, at p. 37.

At all times material here, except for one brief period, the processing of oil and gas offers for lands in the Kenai moose range was suspended, pending revision of the regulations. The first of the offers under consideration was filed on May 21, 1954. Almost 9 months before, the Bureau of Land Management, by a memorandum dated August 31, 1953, ordered the suspension of action on all oil

³ In Order No. 2714, *supra*, the Department specifically directed that "All pending applications for such leases * * * shall be rejected." (This is the same type of action that is being complained of here.)

and gas offers within a fish and wildlife refuge until further notice pending a study of the policy and regulations relating to the issuance of leases in wildlife refuges.

On December 6, 1955, the Department amended the oil and gas regulation, 43 CFR 192.9 (20 F.R. 9009; Circular 1945), to close certain areas to leasing, make some available for leasing under restrictions, and open others to unrestricted leasing. It appears that the Bureau considered that the approval and publication of the amended regulations automatically vacated the suspension order of August 31, 1953, and issued some oil and gas leases.

On December 20, 1955, the Director of the Fish and Wildlife Service asked the Director of the Bureau of Land Management to withhold action on all oil and gas lease offers for lands opened to unrestricted leasing because of certain inaccuracies in classification. By a letter dated February 6, 1956, the Chairman of the Committee on Merchant Marine and Fisheries of the House of Representatives notified the Secretary of the Interior that his committee was considering legislation to vest authority to dispose of wildlife refuges solely in Congress. He requested that the Department suspend its activities looking toward alienation of any interest in lands under the jurisdiction of the Fish and Wildlife Service until his committee had concluded its investigation. Thereupon, on February 6, 1956, the Bureau of Land Management directed its field offices to suspend action on all offers for oil and gas leases in fish and wildlife areas until March 1, 1956. This suspension was extended several times and on March 30, 1956, was made indefinite.

On October 11, 1957, notice was published in the Federal Register of a proposed revision of 43 CFR 192.9 (22 F.R. 8088). Paragraph (d) of the proposed regulation clearly stated that part or all of the Alaska wildlife areas might be closed to mineral leasing. Thereafter, a 2-day hearing was held on December 9 and 10, 1957, at which many proponents and opponents of the proposed regulation appeared, testified, and offered exhibits. A substantial portion of the testimony, both pro and con, was directed to the Kenai National Moose Range. The proposed regulation was modified as to form and adopted on January 8, 1958 (23 F.R. 227; Circular 1990). It was followed on July 24, 1958, by the agreement dividing the moose range into leasable and nonleasable areas.

The amended regulation provides that "All pending offers or applications heretofore filed for oil and gas leases covering game ranges, coordination lands, and Alaska Wildlife areas, will continue to be suspended until the agreements referred to in paragraph (b) (3) of this section shall have been completed." 43 CFR, 1958 Supp., 192.9(d).

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Upon the approval of the agreement of July 24, 1958, all the offers pending for lands in the part closed to leasing were rejected.

In summary, the only period from August 31, 1953, to January 8, 1958, when the processing of oil and gas lease offers for lands in the Kenai moose range was not suspended was from December 6, 1955, to February 6, 1956, a period of two months. None of the offers on appeal was filed in that period. In other words, the appellants filed their offers at times⁴ when it was well known that the Department was deeply involved in attempts to work out a solution to the problem of the conflicting demands for the utilization of the moose range and when it was perfectly apparent that one course of action the Department might adopt would be to close all or part of the moose range to leasing. In the circumstances, the appellants cannot properly allege that the fact that they filed offers raises any equitable considerations in their behalf. At best, they gambled that the lands they applied for would be opened to leasing. Having lost, they have little ground for complaint.

In any event, the determination of whether or not to lease tracts of public land under the Mineral Leasing Act is based upon the public interest, not upon whether one applicant managed to file an offer, or a series of offers, before the Secretary made his finding.

The offerors also assert that even if the Secretary has authority to determine in his discretion whether oil and gas leases should be issued for all or part of the moose range, it was unnecessary to prohibit oil and gas leasing on all or part of it in order to attain the purposes for which it was withdrawn. In support of these contentions they have submitted arguments and exhibits purporting to demonstrate that "oil is compatible with moose" or that the division made is illogical.

However, the proposed revision of 43 CFR 192.9 was published in the Federal Register and a hearing was held. The proposed regulation clearly provided that all or part of the range might be closed to oil and gas leasing. Many of the appellants or their representatives appeared at the hearing and made substantially the same arguments. In addition, other persons testified in support of their position. There was also, of course, a great deal of testimony in opposition.

The agreement reached between the Bureau of Land Management and the Fish and Wildlife Service and signed by the Secretary was arrived at in full awareness of all the factors involved and represents the considered judgment of the Bureaus and the Secretary that the division of the moose range is the proper method of balancing the several components of the public interest in this area.

Another contention is that the Secretary has failed to comply with the requirements of the Administrative Procedure Act, 5 U.S.C., 1958

⁴ The offers were filed at various times from May 21, 1954, to January 8, 1958.

ed., sec. 1001 *et seq.* One argument is that the agreement of July 24, 1958, is rule making and that section 4 of the Administrative Procedure Act (5 U.S.C., 1958 ed., sec. 1003) requires notice and hearing of proposed rule making. First, as has been pointed out, notice was given and a hearing held on the proposed revision of 43 CFR 192.9. The agreement relating to the moose range was contemplated in the proposed regulation and all interested parties had ample opportunity to present their views. More important, the regulation involves the use of public property and "matters relating to public property are expressly excepted from the requirements of section 4 by the introductory paragraph of the section." *Wade McNeil et al.*, 64 I.D. 423, 429-430 (1957).⁵

In the alternative, it is contended that the agreement is an adjudication which, under section 5 of the Administrative Procedure Act (5 U.S.C., 1958 ed., sec. 1004) requires that the notice and hearing procedure of that section be followed. However, the provisions of the Administrative Procedure Act do not apply to determinations relating to the issuance of an oil and gas lease because no hearing is required by the Mineral Leasing Act, *Northern Pacific Railway Company et al.*, 62 I.D. 401, 410 (1955), nor have the offerors any rights which require a hearing to satisfy the due process requirements of the Constitution. See *United States v. Keith V. O'Leary et al.*, 63 I.D. 341 (1956).

In addition to the offerors, the Standard Oil Company, which entered into an oil and gas development contract with the United States of America on July 14, 1954, for an area which includes a portion of the area in the moose range closed to leasing has filed a motion to intervene and presented arguments in favor of the offerors from whom it has acquired options. The motion to intervene is allowed. In addition to the arguments made by one or more of the appellants, Standard contends that the rejection of the lease offers

⁵ The *McNeil* decision was attacked in court, *Wade McNeil v. Fred A. Seaton*, Civil No. 648-58, United States District Court for District of Columbia. On June 4, 1959, the court held for the defendant. In sustaining the validity of the special rule for grazing on public lands, which was attacked in the departmental proceedings, the court said, in answer to the contention that the proposed rulemaking provisions of the Administrative Procedure Act had not been observed in the adoption of the special rule:

"The government relies on the exception involved in the phrase 'public property'. There is no doubt that public lands are public property. The rule here in question involved a matter relating to public lands and, therefore, public property. It follows, therefore, that the requirements of Section 1003 of Title 5, United States Code, do not apply to the adoption of the rule here in question."

Upon appeal, the decision of the District Court was reversed on the merits, but on this point the court said:

"[Appellant], asks us to strike down the Special Rule on the ground, among others, that the rule was issued without notice and hearing. We do not agree with appellant on that proposition. * * * Again, the notice requirements of section 4 of the Administrative Procedure Act * * * contain an express exception when there is involved rule making relating 'to public property, loans, grants, benefits, or contracts.' That we are here dealing with matter relating to public property is obvious * * *." *McNeil v. Seaton*, 281 F. 2d 931, 936 (D.C. Cir. 1960).

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violates its rights under the contract. However, I can find nothing in the contract which obligated the United States in any way to issue leases within the moose range, or, indeed, anything which assures Standard that any leases within the moose range will be optioned to it.

Standard submitted the development contract for approval by a letter dated May 14, 1954. The letter recited that various individuals "are holders of or have filed" offers for lands in the southerly portion of the Kenai Peninsula; that Standard has been offered operating agreements "covering leases heretofore issued and which shall hereafter be issued pursuant to lease offers filed by individuals as aforementioned"; and that Standard is willing to acquire such operating agreements provided the development contract is approved. It is interesting then to note that the only offers listed in Standard's motion to intervene were filed on May 21, 1954, seven days after Standard submitted the development contract for approval, and that Standard did not acquire options on the offers until June 15, 1954.

Moreover, Standard's letter of May 14, 1954, stated:

The proposed contract places no restriction whatsoever on the leasing by the United States under the General Leasing Act or otherwise, of any Public Domain or Territorial School lands located within the area defined in the contract.

Furthermore, section 17 of the contract provides that "* * * no operations shall be conducted pursuant to this agreement upon any lands included in such range without prior approval of the appropriate controlling Federal agency." This provision makes it clear that Standard entered into the contract without any assurance that lands in the moose range would be made available to it.

Finally, there is still more acreage within the area covered by the development contract than Standard may hold under it.

I find Standard's contentions, therefore, to be without merit.

Therefore, the decisions of the Director and Acting Director of the Bureau of Land Management are affirmed.

JOHN A. CARVER, JR.,

Assistant Secretary of the Interior.

APPENDIX

A-28090:

Richard K. Todd	----- Anchorage	026746
Richard K. Todd	----- Anchorage	026749
Mrs. Mary P. Boyd	----- Anchorage	026752
R. R. Clements	----- Anchorage	026756
R. R. Clements	----- Anchorage	026757
R. R. Clements	----- Anchorage	026758
R. R. Clements	----- Anchorage	026759
R. R. Clements	----- Anchorage	026760
R. R. Clements	----- Anchorage	026761
Charles D. Ealand	----- Anchorage	026763

Tom H. Dowlen	Anchorage	026767
Tom H. Dowlen	Anchorage	026768
Tom H. Dowlen	Anchorage	026769
Tom H. Dowlen	Anchorage	026771
Tom H. Dowlen	Anchorage	026772
The Ohio Oil Company	Anchorage	028044
The Ohio Oil Company	Anchorage	028045
The Ohio Oil Company	Anchorage	028046
L. P. Foote	Anchorage	028090
A. F. Tokash	Anchorage	028095
M. B. Kirkpatrick	Anchorage	028098
Estate of E. Wells Ervin	Anchorage	028145
Estate of E. Wells Ervin	Anchorage	028147
Gene B. Graham	Anchorage	028594
Gene B. Graham	Anchorage	028597
Gene B. Graham	Anchorage	028598
Gene B. Graham	Anchorage	028599
George Hall Douglass	Anchorage	028606
George Hall Douglass	Anchorage	028610
E. J. Feisel, Jr.	Anchorage	028745
E. J. Feisel, Jr.	Anchorage	028746
H. W. Nagley, Jr.	Anchorage	029147
E. E. Rasmuson	Anchorage	029180
H. Willard Nagley, Jr.	Anchorage	029247
H. Willard Nagley, Jr.	Anchorage	029248
Milan Raykovich	Anchorage	029250
Milan Raykovich	Anchorage	029251
Milan Raykovich	Anchorage	029253
Milan Raykovich	Anchorage	029254
Milan Raykovich	Anchorage	029255
Milan Raykovich	Anchorage	029256
Milan Raykovich	Anchorage	029257
Milan Raykovich	Anchorage	029258
Robert B. Atwood	Anchorage	029287
Robert B. Atwood	Anchorage	029288
Robert B. Atwood	Anchorage	029290
Robert B. Atwood	Anchorage	029291
Robert B. Atwood	Anchorage	029292
Robert B. Atwood	Anchorage	029293
Robert B. Atwood	Anchorage	029294
Rodney L. Johnston	Anchorage	029295
Rodney L. Johnston	Anchorage	029296
Rodney L. Johnston	Anchorage	029297
Rodney L. Johnston	Anchorage	029298
Rodney L. Johnston	Anchorage	029299
Rodney L. Johnston	Anchorage	029300
L. E. Grammer	Anchorage	029314
L. E. Grammer	Anchorage	029315
L. E. Grammer	Anchorage	029434
L. E. Grammer	Anchorage	029435
Jack V. Walker	Anchorage	029577
Jack V. Walker	Anchorage	029578
Stanley E. Symons	Anchorage	029584
Sidney L. Schwartz	Anchorage	029586

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Walter A. Hamshaw	-----	Anchorage	029588
Sidney L. Schwartz	-----	Anchorage	029590
Sidney L. Schwartz	-----	Anchorage	029592
Stanley E. Symons	-----	Anchorage	029596
Stanley E. Symons	-----	Anchorage	029597
Dr. E. Earll Kinzer	-----	Anchorage	029617
Dr. E. Earll Kinzer	-----	Anchorage	029618
Dr. E. Earll Kinzer	-----	Anchorage	029619
Dr. E. Earll Kinzer	-----	Anchorage	029620
Dr. E. Earll Kinzer	-----	Anchorage	029621
Clay E. Selby	-----	Anchorage	029628
Clay E. Selby	-----	Anchorage	029629
Clay E. Selby	-----	Anchorage	029631
Clay E. Selby	-----	Anchorage	029632
Sydney D. Smith	-----	Anchorage	029653
L. E. Grammer	-----	Anchorage	029735
L. E. Grammer	-----	Anchorage	029736
E. J. Feisel, Jr.	-----	Anchorage	029737
Lloyd Kilkeary	-----	Anchorage	029738
Mrs. Elizabeth W. Coney	-----	Anchorage	029739
Sidney L. Schwartz	-----	Anchorage	029741
Martin J. Dinkelspiel	-----	Anchorage	029742
Marco F. Hellman	-----	Anchorage	029743
Lloyd F. Smith	-----	Anchorage	029765
L. E. Grammer	-----	Anchorage	029766
Alexander S. Dunham	-----	Anchorage	029767
Mrs. Esther R. Brautigam	-----	Anchorage	029778
Jack V. Walker	-----	Anchorage	029790
John N. Ferguson	-----	Anchorage	029794
J. L. McCarrey, Jr. & Mrs. Cora B. McCarrey	-----	Anchorage	029799
Mrs. Eleanor E. Lane	-----	Anchorage	029800
Kenneth M. Johnston	-----	Anchorage	029801
Estate of Ralph T. Sweet	-----	Anchorage	029802
N. Fred Nelson	-----	Anchorage	029858
Jack V. Walker	-----	Anchorage	029961
A. B. Hayes	-----	Anchorage	030008
Stanley E. Symons	-----	Anchorage	030126
Newton H. Neustadter, Jr.	-----	Anchorage	030127
Stanley E. Symons	-----	Anchorage	030132
George N. Keyston, Jr.	-----	Anchorage	030205
George N. Keyston, Jr.	-----	Anchorage	030206
George N. Keyston, Jr.	-----	Anchorage	030207
George N. Keyston, Jr.	-----	Anchorage	030208
George N. Keyston, Jr.	-----	Anchorage	030209
George N. Keyston, Jr.	-----	Anchorage	030210
George N. Keyston, Jr.	-----	Anchorage	030211
George N. Keyston, Jr.	-----	Anchorage	030212
George N. Keyston, Jr.	-----	Anchorage	030213
George N. Keyston, Jr.	-----	Anchorage	030214
George N. Keyston, Jr.	-----	Anchorage	030215
J. E. Dawson, Jr.	-----	Anchorage	030422
J. E. Dawson, Jr.	-----	Anchorage	030427
J. E. Dawson, Jr.	-----	Anchorage	030428

J. E. Dawson, Jr.	Anchorage	030429
Thorwald & Marie T. Osbo	Anchorage	034586
Bert F. Duesing	Anchorage	036561
Bert F. Duesing	Anchorage	036562
Bert F. Duesing	Anchorage	036563
Bert F. Duesing	Anchorage	036564
Bert F. Duesing	Anchorage	036565
Bert F. Duesing	Anchorage	036566
Bert F. Duesing	Anchorage	036567
Bert F. Duesing	Anchorage	036568
Bert F. Duesing	Anchorage	036569
Jack V. Walker	Anchorage	038084
Edward R. Coney	Anchorage	038376
Mrs. Edna Mae Walker	Anchorage	038936
Mrs. Edna Mae Walker	Anchorage	038937
Newton H. Neustadter, Jr.	Anchorage	038952
Mrs. Edna Mae Walker	Anchorage	039138
Mrs. June M. Hines	Anchorage	039739
Mrs. June M. Hines	Anchorage	039740
Mrs. June M. Hines	Anchorage	039741
Mrs. June M. Hines	Anchorage	039742
Edward R. Coney	Anchorage	039743
Edward R. Coney	Anchorage	039744
Edward R. Coney	Anchorage	039745
Edward R. Coney	Anchorage	039746
Edward R. Coney	Anchorage	039747
Edward R. Coney	Anchorage	039748
Mrs. Elizabeth W. Coney	Anchorage	039811
Mrs. Elizabeth W. Coney	Anchorage	039812
Mrs. Elizabeth W. Coney	Anchorage	039890
George N. Keyston, Jr.	Anchorage	039891
George N. Keyston, Jr.	Anchorage	039892
George N. Keyston, Jr.	Anchorage	039893
George N. Keyston, Jr.	Anchorage	039924
George N. Keyston, Jr.	Anchorage	039925
Dome Oil Exploration Company	Anchorage	040187
Dome Oil Exploration Company	Anchorage	040188
Dome Oil Exploration Company	Anchorage	040189
Dome Oil Exploration Company	Anchorage	040190
Dome Oil Exploration Company	Anchorage	040191
Mrs. June M. Hines	Anchorage	040635
L. E. Grammer	Anchorage	040681
Dome Oil Exploration Company	Anchorage	040682
Dome Oil Exploration Company	Anchorage	040683
Alvest, Inc.	Anchorage	040135
Alvest, Inc.	Anchorage	040136
Alvest, Inc.	Anchorage	040137
A-28311:		
Esther R. Brautigam	Anchorage	040636
A-28374		
M. B. Kirkpatrick	Anchorage	028099

*July 11, 1961***COLUMBIA BASIN REPAYMENT PROBLEMS—COLUMBIA BASIN PROJECT, WASHINGTON****Bureau of Reclamation: Findings of Feasibility**

With enactment of the Reclamation Project Act of 1939 (53 Stat. 1187) the concept of an equitable distribution of costs and benefits replaced the previous concept of assumption of total costs by the water users with credits from certain project revenues including new power revenues.

Bureau of Reclamation: Allocation of Costs

A principal purpose of the Reclamation Project Act of 1939 was to place water user repayment on a basis of payment ability rather than to burden them with all costs.

Bureau of Reclamation: Findings of Feasibility—Bureau of Reclamation: Allocation of Costs

When the finding of feasibility is made by the Secretary, pursuant to Section 9a of the Reclamation Project Act of 1939, including estimates of costs, allocation of such estimates, and findings as to probable return of the reimbursable and returnable portions of the estimates, and has been transmitted to Congress, the requirement of that subsection of the Act has been fulfilled.

Bureau of Reclamation: Repayment and Water Service Contracts

The requirements of repayment and return are not a function of Section 9a of the Reclamation Project Act of 1939 but are dealt with in Sections 9c, 9d, and 9e. The latter subsections deal not with estimates, as does Section 9a, but with actual costs. The amount to be repayed by water users under Section 9d is not limited to that part of the *estimated* cost allocated to irrigation in the finding of feasibility prepared under Section 9a.

Bureau of Reclamation: Repayment and Water Service Contracts

The 1945 repayment contracts with the three Columbia Basin Project districts established the legal obligations of the District and the United States as required by Section 9d of the 1939 Act.

Bureau of Reclamation: Findings of Feasibility

A finding of feasibility prepared pursuant to Section 9a of the Reclamation Project Act of 1939 does not itself commit the United States to complete the project regardless of cost and to apply power revenues to repay all costs above the estimates made in the finding.

Bureau of Reclamation: Repayment and Water Service Contracts

Where a repayment contract is entered into with the water users, based on estimates of costs at that time, and provides for a determination by the Secretary as to continuation of work when increased costs reach a ceiling fixed in the contract, the Secretary may require an additional obligation assumed by the water users as a condition to continuation of construction when that ceiling is reached. In reaching a decision the Secretary must consider the ability of water users to bear increased costs as well as the ability of purchasers of power to absorb them.

M-36620

JULY 11, 1961.

TO THE UNDER SECRETARY.

You have requested an opinion as to relationship of House Document No. 172, 79th Congress, 1st Session, entitled "Report on the Columbia Basin Project on the Columbia River," to the 1945 repayment contracts with the three Columbia Basin Irrigation Districts.

The water users on the project have raised this question as an issue to be met in settlement of the project's repayment problem. Underlying the question as raised by the water users are two more specific questions that relate to House Document No. 172. These are:

(1) What is the effect of the so-called "interest component" special account of \$70,786,815 on the Columbia Basin controversy?

(2) Does House Document No. 172 require the Secretary to complete the project, irrespective of cost, and apply power revenues to pay all costs above the original estimate?

The answer to the first question is that the interest component revenues are not now relevant to the Columbia Basin project controversy. The answer to the second question is "no."

Section 7(b) of the Reclamation Project Act of 1939 authorizes the Secretary to make allocation of costs pursuant to Section 9(a) of that Act and to negotiate repayment contracts in accordance with Section 9(d) or 9(e) thereof on any project that was under construction but for which no repayment contracts had been made at the time the 1939 Act was enacted. The Columbia Basin project was such a project.

House Document No. 172 sets out the estimates of costs of the various features, the allocations of these estimated costs and estimates of the returns and repayments from the project to be applied against the respective allocations. These estimates were the basis for fixing the obligations of the three project districts under their contracts. The House Document also describes generally the project works which are the subject of the repayment contracts.

I.

The "interest component" revenues were accumulated as a result of a Secretarial determination arising out of a difference of opinion within the Department, while House Document No. 172 was under preparation, as to the requirements for power rate levels under Section 9(c) of the 1939 Act.

One view was that the law requires revenues sufficient to return 3 percent interest on the annual unamortized balances of that part of the project investment allocated to power in addition to revenues sufficient to amortize the investment allocated to power plus that part of the irrigation allocation beyond the repayment ability of the water users and assigned for return from power revenues (the irrigation

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subsidy). The other view was that the 3 percent interest represents a rate of return which could be applied to reimburse the Government for both the costs allocated to power and the irrigation subsidy. The second view argued, therefore, that if rates are to be expressed in terms of "amortization with interest," the 3 percent interest (the interest component) could be applied to assist in the retirement of the irrigation subsidy.¹

The Solicitor, by Opinion M-33473, dated September 1944, agreed with the second view, but he also held that the Secretary had discretionary authority to fix rates at such higher levels as he determined to be proper. Thus he held in effect that the Secretary might, if he wished, fix rates in accordance with the view first above stated, i.e., to produce revenues sufficient to amortize all construction costs allocated to power and the costs allocated to irrigation which are beyond the ability of water users to repay, in addition to interest at not less than 3 percent annually on the unamortized balances of the power allocation.

The Secretary in framing House Document No. 172 chose the latter course. This means, under the estimates used in House Document No. 172, that during the repayment period ending with the year 2017, power revenues of \$70,786,815 (i.e., the interest component) would be accumulated which, under the Solicitor's opinion, were in excess of minimum repayment requirements.

The report proposed that this amount, being considered as in excess of returns required by law, should be earmarked in a special account in the Treasury, to be available for three purposes:

(1) A reduction, if and when circumstances warrant and within stated limits, of the total obligation for construction charges which the water users are required to assume under the Columbia Basin Project Act.

(2) A reduction in power rates in an amount equal to the total sum available for reduction in the water users' obligation.

(3) To be taken into account in determining the financial feasibility of various irrigation and power projects that may be undertaken in the Columbia River Basin. -(House Doc. 172, viii).

The proposal was carried into the repayment contracts by the following provision:

9(e). When the project works as described in the Secretary's report of January 31, 1945 (H. Doc. No. 172, 79th Cong., 1st Sess.) are completed, or substantially so (or at such earlier time as the Secretary may fix), the Secretary shall determine the actual construction costs, including estimates for whatever works then remain to be completed, and shall review the tentative determination heretofore made as to the amount of project construction costs to be repaid by the project water users. This review shall take account of the requirements of law as to the return to be made to the United States, the

¹ Both views were in agreement that the required returns were in addition to operation, maintenance and replacement costs.

actual cost of the project as compared with the estimate appearing in the Secretary's report of January 31, 1945, the various factors that bear directly on the ability of the water users to meet their construction cost obligation under the terms of this contract, and all other factors that the Secretary concludes are pertinent to the final determination of the amount to be repaid by the project water users. If he concludes that considering all these matters there is justification therefor, he may reduce the average amount per acre of construction cost obligation for the net irrigable acreage of the entire project from eighty-five dollars (\$85.00), but in no event shall it be reduced below seventy dollars (\$70.00). In the event such a reduction is made, there shall be a redetermination of the District's construction cost obligation pursuant to the provisions of this article on the basis of the revised average per-acre construction cost obligation. If the Secretary concludes no reduction is justified, the District shall be given notice to this effect and the tentative determination that the amount to be repaid is to be calculated as provided in this article using eighty-five dollars (\$85.00) as the average amount per acre shall thereupon become final.²

House Document No. 172 proposed that the interest component to be subjected to the special treatment above noted was to be held stable at \$70,786,815 notwithstanding any excess of the actual construction costs over the estimates. Such an excess was to be met "by an extension of the repayment period beyond 2017, if and to the extent necessary."³ It has been suggested that the quoted language means that power was to assume all costs over and above the estimates used in House Document No. 172, including all irrigation costs and that none of the latter, over and above the estimate then used, would or could be made the subject of additional repayment contract coverage. For reasons hereinafter discussed we believe this suggestion to be unwarranted in any event. Suffice it to say at this point that since interest accumulates only on costs allocated to power, not costs allocated to irrigation but assigned for repayment from power, the statement can be considered only as referring to the power allocation. Moreover, the phrase "if and to the extent necessary" is itself equivocal and does not, even in terms, necessarily foreclose the possibility that some increase in costs might be assigned in the future for water user repayment.

Following issuance of Solicitor's Opinion M-33473, which was the basis for the conclusion that the interest component revenues could be regarded as surplus, that opinion became the object of Congressional criticism in connection with several Appropriation Acts in its application to the Columbia Basin project. See hearings before the subcommittee of the House Appropriations Committee on the Interior Department's appropriation bills for fiscal year 1946, Part

² The numbering of the Subsection is that used in the project repayment contracts as originally entered into. Later amendments, not pertinent to this opinion, have modified the contracts to some extent with a resultant change in section numbering. The quoted provision is now Subsection 9(c) of the contracts as amended.

³ House Doc. 172, page 27.

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1 (pp. 1266-1277), for fiscal year 1947, Part 2 (pp. 400-402), for fiscal year 1948, Part 3 (pp. 457-469), and for fiscal year 1949, Part 3 (pp. 191-192). See also hearings before the subcommittee, Part 2 (pp. 837-869) of the Senate Appropriations Committee on the Interior Department's appropriation bill for fiscal year 1948.

The Interior Department's appropriation bill for fiscal year 1948 (61 Stat. 460) included the following language:

Provided further, That interest heretofore collected by the Bonneville Power Administration from sales of electric energy generated at Grand Coulee Dam on the unamortized balance of investment allocated to power in Grand Coulee Dam shall be covered into the reclamation fund forthwith:

Provided further, That said interest shall not be allocated during the fiscal year 1948.

The interest covered was transferred from the special account to the reclamation fund, as directed by Congress. On May 28, 1951, Secretary of the Interior Chapman approved a request by the Bureau of Reclamation to suspend further use of the special account and transfer the amounts to the reclamation fund.

Whatever might be the effect of the foregoing Congressional and administrative actions if a reduction in the \$85.00 figure were to be in contemplation, it is apparent that no basis for application of the interest component exists under the standards set out in either House Document No. 172 or in Subsection 9(e) of the contracts. Reduction of the \$85.00 per acre figure was, under Subsection 9(e) of the contracts, a matter of Secretarial discretion to be determined on the basis of a number of factors there specifically enumerated and "all other factors that the Secretary concludes are pertinent." The tremendous increase in construction costs that have come about since 1945 alone, without considering such other facts as the requirement that would obtain in that event of a reduction in power rates in equal amount, has long since ruled out any possibility of a reduction in the \$85.00 per acre average repayment figure.

For the foregoing reasons, it is my opinion that the interest component revenues now have no actual bearing on the Columbia Basin Project controversy.⁴

⁴ It is unnecessary here, therefore, to consider the validity of the conclusion reached in Opinion M-33473. In addition to the Congressional dissatisfaction noted in the text, the opinion has been the subject of considerable Congressional attention. In authorizing the Kennewick Division of the Yakima project, the Congress by Section 5 of the Act of June 12, 1948 (62 Stat. 382), authorized application of one-fifth of the interest component revenues in aid of irrigation. The Kennewick Division is the only instance of a specific legislative authorization for application of interest component. The interest component issue was the subject of bills on which hearings were held by interested House Committees in the 79th and 80th Congresses. See printed hearings on H.R. 5124, 79th Congress, and on H.R. 1772, H.R. 1886, H.R. 1977, H.R. 2583, H.R. 2873, and H.R. 2874, 80th Congress. Save for the Kennewick Division, no power payout study for any project of the Bureau of Reclamation has included application of interest component revenues since fiscal year 1953.

II.

That a negative answer is required to the second question is clear from a consideration of the provisions of Section 9 of the Reclamation Project Act of 1939 as they relate to reports such as House Document No. 172 and to repayment matters.

As stated at the outset of this opinion, House Document No. 172 was prepared and the repayment contracts were negotiated pursuant to Sections 9(a) and 9(d) respectively of the 1939 Act.

The Reclamation Project Act of 1939 gave general statutory expression to a trend developed in a number of special laws related to particular projects or of limited application adopted in the decade preceding its enactment. Until then, for the most part, the general law had established projects on the basis of the assumption by water users of the whole construction cost obligation arising from the entire project, including its incidental power, flood control or other facilities. As a corollary, the water users received credit for, among other project revenues, all net power revenues. The provisions of the 1939 Act recognize "the widespread and multiple benefits derived from construction under the reclamation program and provide for an equitable and more widespread distribution of the costs of those benefits,"⁵ through allocations to be made in accordance with the Act, and repayment or other contracts reflecting those allocations to be made with the respective classes of beneficiaries of the multiple-purpose projects as contrasted to the prior practice of assumption by irrigation water users of the total repayment obligation. A principal purpose was to place water users repayment on a basis of payment ability rather than to burden them with all costs.

Section 9(a) of the 1939 Act deals with reports such as House Document No. 172. It provides for allocation of estimated costs and estimates of repayments. Necessarily, these repayments are expressed as estimates in any event, by reason of the time when repayment contracts are required to be made under Section 9(d) of the Act.⁶

Having made a report as to estimates of costs, allocation of such estimates and findings of probable return of the reimbursable portions of the estimates, the function intended to be served by Section 9(a) has been fulfilled.

The requirements of repayment and return are not a function of Section 9(a). These requirements are dealt with in Subsections 9(c), (d), and (e). These subsections treat of the problem in terms of cost, not estimates of costs. Subsection 9(c), dealing with power rates and the return from power revenues, does so in terms of "con-

⁵ See House Report No. 995, 76th Cong., 1st Sess., p. 5.

⁶ Before delivery of water on, in cases where the lands are for the most part owned by the United States, before the end of the development period.

July 11, 1961

struction investment" and "other fixed charges," not of "estimated cost" as that term is used in Subsection 9(a). Subsection 9(d) requires that water users repay "construction costs" allocated by the Secretary for return by the water users. The amount is not limited to that part of the estimated cost allocated to irrigation in the finding of feasibility prepared under Subsection 9(a). Thus, we have a statutory pattern that provides, in effect, that in determining what actual increases in irrigation costs are to be met from power revenues, consideration is to be given to water user repayment ability.

The provisions of the project repayment contracts are completely consistent with the foregoing.

Section 6(c) of the contracts, after referring to the *estimated* construction cost of the works allocated to irrigation, states that, "the United States will undertake the construction of the irrigation system of the project and carry the construction through to completion to the extent possible within the limit of cost above stated" (emphasis supplied). There is, therefore, no question that as a matter of contract the Secretary and the project districts agreed that the United States was not required to proceed beyond the limits of expenditure provided in the contracts.

The contracts were under negotiation contemporaneously with preparation of House Document No. 172. They are dated October 9, 1945, and were signed on behalf of the United States by Secretary Ickes. House Document No. 172 was approved by Secretary Ickes January 31, 1945, and transmitted by him to the President and the Congress on March 27 and May 8, 1945, respectively. The contracts and House Document No. 172 must be considered as complementary.

The contracts proceed from the estimates used in House Document No. 172 and, reflecting the legal requirements of Subsection 9(d) of the 1939 Act, they proceed to establish the legal obligations of the Districts and the Government. They established those relationships, as Section 9(d) requires, in such a way that as the project underwent its metamorphosis from estimates of costs and prospective features toward actual costs and works in being, further consideration could be given to repayments and returns designed, if the project were to be completed, to reflect an appropriate distribution of the burden of repayment of actual costs of the irrigation features as between the water users on the one hand and the power users on the other.

Under the estimates set out in House Document No. 172 that distribution of repayment started out in a balance based on considerations of repayment ability of the water users and the availability of power revenues. The contract provisions, consistent with the law, enable a review in order to accomplish repayment of actual costs with a balanced relationship maintained as between these factors.

In making his findings under Subsection 9(a) the Secretary may not, merely because power revenues might be sufficient in a given case to return all irrigation costs, conclude that the water users are not to be obligated to repay any of them. It is no more logical, nor is the Secretary so required, to proceed to contract on the basis that if actual costs substantially exceed estimates, all of the increase will be borne by the purchasers of power alone without regard to the ability of the water users to carry any of the increase.

House Document No. 172 had been transmitted to the Congress not more than six months prior to the execution of the contracts. These contracts, with water user agreement, made careful and explicit provision limiting the Government's obligation. Considering the relationship between Subsections 9(a) and 9(d) of the 1939 Act, it is clear that by House Document No. 172 the Secretary could not have intended to foreclose, nor did he, the possibility that the water users might one day be asked to undertake an additional obligation on account of increases in actual costs.

That House Document No. 172 does not speak specifically on the subject of increases in water user repayment while referring to a possible downward adjustment "if circumstances warrant" is not surprising. As explained above, its function was to establish estimates as a basis for bringing the project under the 1939 Act. Moreover, it was appropriate to indicate an intended disposition of what, at the time of preparation of House Document No. 172, was considered to be a fund of \$70,786,815 in excess of minimum repayment requirements that would accumulate. In the contract which fixed the legal relationship of the parties, however, it became important to deal with the possibility of a substantial increase in actual cost. The parties took care to provide for both the contingency of a reduction in charges and for an opportunity to terminate construction in the face of sharply increasing costs. It would require much clearer indications than can be found in the text of House Document No. 172 to warrant a conclusion that it was intended as a guarantee that the power users would be required to absorb all increases in actual construction cost of the irrigation features of the project.

Finally, it should be observed that the United States cannot compel the Districts to enter into new contracts. They are entitled, if such is their decision, to continue under their existing contracts. However, in that event, they must live with all of the contract terms, including the retention of the existing ceiling on the obligation of the United States to construct irrigation works and the bearing of the drainage costs over and above \$8,176,000 as operation and maintenance. If, on the other hand, a change in either of these is to occur new contracts must be entered into.

September 21, 1961

To summarize:

(1) The function of House Document No. 172 was to estimate both costs and returns and to allocate those estimates.

(2) By the contracts, consistent with law, the parties agreed that the United States was to be under no obligation to proceed with irrigation works beyond a cost of \$280,782,180 with all drainage costs in excess of \$8,176,000 to be charged as operation and maintenance; and

(3) The contracts themselves demonstrate that the parties did not regard House Document No. 172 as obligating the Government to proceed to complete the irrigation works in the event of an increase in costs without additional repayment coverage.

FRANK J. BARRY,
Solicitor.

**AUTHORITY OF THE SECRETARY OF THE INTERIOR
TO APPROVE THE ADVANCEMENT OF TRIBAL JUDGMENT FUNDS
FOR TRIBAL PURPOSES**

Indian Tribes: Judgment Funds

Under general statutory authority empowering the Secretary of the Interior to approve the advancement of tribal funds to Indian tribes, the Secretary is authorized to advance all categories of tribal funds, including tribal judgment funds.

M-36628

SEPTEMBER 21, 1961.

TO THE SECRETARY OF THE INTERIOR.

You have requested my views whether under existing law there is authority for the use of funds awarded by the Indian Claims Commission or the Court of Claims to an Indian tribe, band or identifiable group for such purpose as may be authorized by the tribal governing body and approved by the Secretary of the Interior.

The matter of the disposition of judgment funds has been the subject of many discussions with representatives of the Bureau of Indian Affairs and this office. It appears that the established practice of the Bureau of Indian Affairs has been to treat as unavailable for expenditure, without specific authorization by Congress, those tribal funds representing the proceeds of judgments recovered against the United States and the proceeds of the sale of reservation lands.

The current Interior Appropriation Act, approved August 3, 1961 (75 Stat. 246), authorizes and appropriates the sum of \$3,000,000 from tribal funds for expenditures for the benefit of Indians and Indian tribes, for particular purposes. The act also makes provision for the advancement of tribal funds to Indian tribes during the current fiscal

year for such purposes as may be designated by the governing body of the particular tribe involved and approved by the Secretary of the Interior. The second cited authority contains no language limiting its application to any particular class of tribal funds or to the use to be made of such funds. The above two provisions have been inserted in the appropriation acts for the past several years.

It is therefore concluded that the Secretary under this authority in the appropriation acts for 1962 and preceding years is and was empowered to advance to an Indian tribe for such purpose as may be designated by the governing body of the tribe, and approved by him, any tribal funds held in the United States Treasury, including those which represent the payment made to satisfy a judgment awarded by the Indian Claims Commission or the Court of Claims. However, any award made by the Court of Claims pursuant to a special jurisdictional act is subject to the uses specified in such act unless otherwise provided by the appropriation act.

In those instances where the tribe, band or identifiable group in whose favor the judgment was rendered has no recognized tribal status or tribal organization to speak for the tribe, band or group and the members are widely scattered, it does not appear that such tribe, band or group could designate the particular purpose or purposes for which the said judgment may be used. Therefore, it would appear that in these instances Congressional authority must be obtained before any disposition is made of any judgment funds awarded to them. Likewise, it would appear, for the same reasons, that a judgment rendered in favor of a tribal group which is composed of members of a tribe as it existed years ago and/or their descendants is not available under the provisions of the current appropriation act. Finally, it should be observed that the distribution of judgment funds as per capita payments without the enactment of special tax-exemption legislation may subject the payments to income taxes.

FRANK J. BARRY,
Solicitor.

COLUMBIAN CARBON COMPANY

A-28632

Decided October 17, 1961

Oil and Gas Leases: Operating Agreements—Oil and Gas Leases: Development Contracts

An operating agreement submitted to the Bureau of Land Management for approval as an operating agreement and approved by the Bureau, and not by the Secretary, as such will not later be considered to be a development contract, which can be approved only by the Secretary.

*October 17, 1961***Oil and Gas Leases: Acreage Limitations—Oil and Gas Leases: Operating Agreements**

In a computation of chargeable acreage under the acreage limitation provisions of the Mineral Leasing Act, an operator of federal land leased for oil and gas purposes is chargeable with an acreage commensurate with its ownership of leases subject to the operating agreement and with the portion of the acreage of other leases which corresponds to its interest in such leases measured by its proportionate share of the production from such leases, if it does not have such effective direct control over the development of the leased lands that it must be charged with the acreage therein as the real party in interest.

Oil and Gas Leases: Acreage Limitations—Oil and Gas Leases: Operating Agreements

An operator under an oil and gas lease, whose rights to develop the land and dispose of the oil and gas produced are dependent upon the consent of the record title holder, does not have such effective direct control over the leases that it must be charged with the acreage therein as the real party in interest.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Columbian Carbon Company has appealed to the Secretary of the Interior from a decision of the Acting Director of the Bureau of Land Management dated July 29, 1960, affirming, as modified, a decision of the Eastern States land office dated December 21, 1959, which dismissed Columbian's protest to the amount of acreage of federal acquired land in West Virginia charged to it as oil and gas lease holdings under section 27 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 184).

Under section 27 of the Mineral Leasing Act, as amended at the time of the land office decision and of the Acting Director's affirmation, a person, association or corporation was forbidden to take or hold in one State at one time oil or gas leases exceeding in the aggregate 46,080 acres.¹ In letters to Columbian dated April 9, 1958, and June 19, 1958, the Eastern States land office determined that Columbian was chargeable with a total of 44,919.5241 acres in leases and applications.² The lease holdings were charged on the basis of leases held by Columbian as the record titleholder, leases in which Columbian held an undivided interest, and leases in which Columbian had an interest as the operator under an operating agreement and supplemental operating agreements.³ The Eastern States office noted

¹ Section 3 of the act of September 2, 1960, amended section 27 by increasing the acreage limitation to 246,080 acres in any one State other than Alaska (30 U.S.C., 1958 ed., Supp. II, sec. 184 (d) (1)).

² The total acreage charged to Columbian is divided thus: 35,292.8641 in leases and 9,626.6600 in applications.

³ Operating agreement dated April 1, 1954, approved by the Bureau of Land Management on May 18, 1954, as modified by a supplemental agreement dated March 24, 1955, approved by the land office on June 20, 1955, a second supplemental agreement dated November 17,

that the operating agreement, as supplemented, bound the four contracting parties thereto, subject to certain options to refrain from participation or to proceed with development procedures without the participation of others, to share in the costs of development and in the oil, gas and condensate produced and saved from the leased land subject to the agreement at the rates of $31\frac{2}{3}\%$, $31\frac{2}{3}\%$, $31\frac{2}{3}\%$ and 5 percent. Accordingly, the land office computed the acreage chargeable to Columbian under section 27 of the Mineral Leasing Act, as amended, on the basis of $31\frac{2}{3}\%$ percent of the entire acreage subject to the operating agreement, except as to the acreage of leases of which Columbian is a titleholder. It charged Columbian with 100 percent of the acreage of leases of which it is the sole titleholder and with $66\frac{2}{3}\%$ percent of others in which it holds an undivided two-thirds interest.

In its protest, filed on December 16, 1959, Columbian challenged the land office computation of chargeable acreage on the ground that it does not have complete administrative and operational control of the land subject to the operating agreement. It did not specify whether it objected to the inclusion of the entire acreage of the leases of which it is the record titleholder or to the inclusion of a percentage of the acreage of the leases in which it owns no interest. The land office interpreted Columbian's protest as alleging that it had only an undivided $31\frac{2}{3}\%$ percent interest in all the leases committed to the operating agreement and that it lacked complete administrative and operational control over the leases. It is not clear whether the land office supposed that Columbian believed it lacked control over its own leases, the other leases committed to the operating agreement or all of these leases. The land office dismissed the protest on the ground that under the applicable regulations and procedures of the Department the acreage embraced in a lease offer is chargeable to the offeror; an entire leasehold interest is chargeable to the lessee; an undivided leasehold interest is chargeable to the lessee to the extent of the percentage owned by the lessee; and acreages of leases subject to an operating agreement are chargeable to the operator according to the percentage provided for in the agreement, unless the operator is the lessee, in which case, it is chargeable with the entire leasehold acreage.

In its appeal to the Director, Columbian contended (1) that the entire acreage of the leases on federal acquired land committed to the operating agreement, amounting to 30,179.3932 acres, should be excepted in a computation of chargeable acreage under the Department's regulations because the agreement is, in fact, "an operating, drilling, or development contract" within the meaning of section 17(b) of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed.,

1956, and a third supplemental agreement dated December 19, 1958, and approved by the land office on March 19, 1959. (The second supplemental agreement was not filed for the Bureau's approval because it does not apply to oil and gas leases on federal acquired land.

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sec. 226e);⁴ (2) that if the acreage of land committed to the agreement is not exempt, Columbian should be charged with only the acreage to which it is the record titleholder amounting to 10,623.8333 acres; and (3) that the decision of December 21, 1959, confirming the land office computation of chargeable acreage is erroneous because of the pyramiding which results from charging each party to the operating agreement with 100 percent of the acreage of each lease of which it is the record titleholder and also charging 31 $\frac{2}{3}$ percent of that same acreage to each of three parties to the operating agreement and 5 percent to the fourth party.

In his decision of July 29, 1960, the Acting Director dismissed, as without merit, Columbian's contention that the operating agreement approved by the Bureau is an operating, drilling or development contract within the meaning and purpose of section 17(b) of the Mineral Leasing Act, as amended. He pointed out that the agreement was submitted for the approval of the land office and that the approval of that office was accepted by Columbian without protest, although it was charged with notice that only the Secretary of the Interior can approve a development contract. The Acting Director found that, although Columbian does not hold the full title to all the leases committed to the operating agreement, it has full control and administration of these leases as the operator under the approved agreement. He thus concluded that Columbian is chargeable as an operator with the full acreage of all the leases and modified the land office decision accordingly. He concluded that Columbian's acreage within the State of West Virginia should be reduced to the allowable acreage for such State in accordance with the applicable regulations (43 CFR, 1959 Supp., 192.3(e) (1) and (2)), and remanded the record to the land office for appropriate action to accomplish such purpose.⁵

In its appeal to the Secretary of the Interior, Columbian contends that the Acting Director's decision is wrong; first because all the acreage covered by the leases under the operating agreement should be excepted from the acreage limitations under 17(b) of the Mineral Leasing Act, as amended, and, second, because, if acreage subject to the operating agreement is chargeable to the parties thereto, each should be charged with only the amount covered by the leases of which it is the record titleholder. Columbian urges, further, that the controversy with the land office related only to the total of the acreage properly chargeable to it; that since this controversy did not arise

⁴ Now 30 U.S.C., 1958 ed., Supp. II, sec. 226(j).

⁵ It is not apparent whether the Acting Director concluded that Columbian is chargeable with 100 percent of the acreage of its own leases as lessee and 100 percent as operator, as well as 100 percent of the acreages of the leases held by the other parties to the operating agreement. He may have intended to charge Columbian with the acreage of its own leases only as lessee. However, it is clear that as to its own leases Columbian has a double role.

from a determination by the land office that Columbian had, at any time, exceeded the allowable acreage limitations prescribed by section 27 of the Mineral Leasing Act, as amended, it was unreasonable for the Acting Director to assume that appropriate action should be taken to reduce any acreage in excess of the allowable limit. It also questions whether such action, if required, should be effected in the manner prescribed by the departmental regulation applicable to public lands. It contends, finally, that it should not be charged with excess acreage in any event because of the amendment of section 27 of the Mineral Leasing Act on September 2, 1960 (*supra*), which raised the permissible limit of oil and gas lease holdings in any one state, other than Alaska, to 246,080 acres.

The Rocky Mountain Oil and Gas Association has also filed a brief, contending that the Acting Director's decision is erroneous insofar as it holds that, pursuant to the operating agreement under consideration in this appeal, Columbian, as operator, has "full control and administration" of all the leases covered by such agreement so that it is chargeable with 100 percent of the acreage of such leases. It suggests that, if the Acting Director's decision should prevail, it might become a precedent for charging anyone designated as an operator with 100 percent of the total acreage under any kind of operating agreement covering a number of oil and gas leases, without regard to the extent of the operator's control over the leases and their operation. Accordingly, it requests that the Columbian appeal not be dismissed as moot because of the enlargement of acreage limitations by the act of September 2, 1960, and that the Acting Director's decision be corrected and clarified.

With respect to Columbian's assertion that the operating agreement, as supplemented, should be considered to be a development contract under which there is no acreage charge, it is sufficient to observe that Columbian has given no effective answer to the Director's ruling on this point. The agreement was submitted for approval as an operating agreement, not a development contract, and its approval as such was accepted by the parties. It is too late now to claim that it is a development contract.

When the land office approved the operating agreement on May 18, 1954, the allowable acreage of oil or gas leases in any one State was 15,360 acres (30 U.S.C., 1952 ed., sec. 184). The approval document evidences the land office conclusion that the parties thereto had each a one-third interest in the leases, leaseholds and lands then or thereafter subject to the terms of the agreement.⁶ A possible acreage problem seems to have been contemplated for the first time in 1958 when as a result of correspondence concerning the acreage chargeable to Columbian a computation was made in accordance with the formula

⁶ There were only three parties to the original agreement.

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described in the letter of April 9, 1958. The revised computation of June 19, 1958, and Columbian's protest followed.

The regulation applicable to the computation of acreage holdings at that time, and now, reads as follows:

In computing acreage holdings or control, the accountable acreage of a party owning an undivided interest of a lease shall be such party's proportionate part of the total lease acreage. Likewise, the accountable acreage of a party owning an interest in a corporation or association shall be his proportionate part of the corporation's or association's accountable acreage. Parties owning a royalty or other interest determined by or payable out of a percentage of production from a lease will be charged with a similar percentage of the total lease acreage. (43 CFR 192.3(b).)⁷

This regulation seems to constitute authority for charging a record titleholder of a lease with the entire acreage of its interest in that lease whether that interest is entire or partial and whether it is direct or indirect. Pursuant thereto, the land office charged Columbian with 100% of the acreage of the leases of which it is the sole record titleholder; it also charged Columbian with 66 $\frac{2}{3}$ percent of the acreage of the leases in which it holds a 66 $\frac{2}{3}$ percent interest. Pursuant to the provision of the regulation which requires that the owner of a royalty or other interest determined by or payable out of a percentage of production from a lease be charged with a similar percentage of the total lease acreage, the land office concluded that Columbian, as operator, has a 31 $\frac{2}{3}$ percent interest payable out of production in the acreages subject to the agreement of which it is not an owner and charged it accordingly.⁸ The land office did not charge Columbian with 31 $\frac{2}{3}$ percent of the acreage of 33 $\frac{1}{3}$ percent of the two leases of which it is the owner of a 66 $\frac{2}{3}$ percent interest. To do so adds 145,8144 acres and the total chargeable acreage becomes 45,065.3385 acres.

The Acting Director's conclusion that the operating agreement gives Columbian full control and administration of all the leases subject to such agreement is without support. An examination of the instrument discloses that the four parties agreed to make their leased land available for cooperative development under the agreement, each party retaining legal title to his or its separate leases; three agreed to bear 31 $\frac{2}{3}$ percent and one to bear 5 percent of the costs of development and operations and to be entitled to 31 $\frac{2}{3}$ or 5 percent

⁷ This regulation is, admittedly, prescribed for the computation of public land acreages pursuant to the statutory limitation. Since, however, the Mineral Leasing Act for Acquired Lands provides that acquired lands "may be leased by the Secretary under the same conditions as contained in the leasing provisions of the mineral leasing laws" (30 U.S.C., 1958 ed., sec. 352), it appears that the same limitation is applicable to both public and acquired land. The Department so provides in the regulations applicable to acquired land (43 CFR 200.6). Accordingly, acreages held pursuant to leases of acquired land are computed in the same manner as acreages held pursuant to leases of public land. See *Bert Wheeler*, 67 I.D. 203 (1960).

⁸ See *Solicitor's Opinion*, 59 I.D. 4, 5 (1945); *Equity Oil Co. et al.*, 59 I.D. 326 (1946).

of the production from the lease acreage developed cooperatively; each bound itself to share in a decision to drill a well and to furnish an aliquot part of the costs and become entitled to a corresponding fraction of production dependent upon the number of consenting parties in each case. Columbian can drill or abandon no wells on its own authority; nor can it determine where wells are to be drilled or to what depth. However, it is required to drill and operate wells for the other parties when it does not participate in the decision to drill and the expense of drilling and a division of production. Columbian cannot release, surrender or assign any of the leases owned by the other parties and it cannot do any of these things in relation to its own leases without first offering them to the other parties to the agreement. Columbian is authorized to drill and to operate oil and gas wells on all the acreage subject to the agreement, but its authority to make expenditures for drilling without the written consent of all the parties is very limited. It is authorized to carry on preliminary negotiations for the sale of oil and gas thus produced, but it has no authority to make sale contracts without the consent of all the other parties. Each party to the agreement may take its share of production in kind and sell separately. Columbian differs from the other parties to the agreement only in that it actually carries out operations on the leased premises and receives its expenses and an overhead allowance of 10 percent for such activity. The complex relationships reflected by this agreement are very different from those contemplated by the usual operating agreement which provides for an operator to assume full responsibility for exploration, development and operation of leased areas at its own expense and in accordance with its own plans and schedules and to satisfy its obligations to the lessees by paying to them a specified royalty upon its sales of oil and gas. The fact that Columbian is designated as the operator does not, in defiance of the plain terms of the agreement, convert its role to that of the ordinary operator with full control of operations and title to production subject only to the royalty interest of the lessees of the land subject to operations. And if Columbian were an operator with full control of lease operations, its chargeable acreage of the leased land in which it has no title interest would be computed with regard to the royalty interest of the lessees. See *Equity Oil Co., et al., supra*. It is only when a person has such complete control over a lease offer and lease and such a beneficial interest in the proceeds of the lease that he is in effect the real party in interest that he is to be charged with acreage as though he were the offeror or lessee. *Yakutat Development Co., Alaska*, 63 I.D. 97, 100 (1956); *Antonio Di Rocco et al.*, A-26434 (July 11, 1952).

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Accordingly, I conclude that the Acting Director erroneously charged Columbian with 100 percent of the acreage of the leases subject to the operating agreement of which it is not the record titleholder.

The land office decision is subject to the objection that it charges Columbian with a fixed interest in the leases of which it is not the record titleholder of $31\frac{2}{3}$ percent, although its actual interest in the well or wells drilled on any tract of leased land may vary from 0 to 50 percent. Since, however, Columbian cannot insure by its own acts that it will acquire an interest greater than $31\frac{2}{3}$ percent and cannot be expected to drill a large number of wells in which it has no ownership, it is reasonable to measure its acreage responsibility under the operating agreement in effect by the interest which it acquires in each well drilled upon the land subject to the agreement in the absence of unusual circumstances. Accordingly, I conclude that the method of computing acreage charges used by the Eastern States land office, with the addition of a charge for the two leases in which Columbian had only a $\frac{2}{3}$ interest, was proper.

It may be that the parties to the operating agreement out of which this appeal has risen may wish to consider the advisability of conforming their plans to a unit or cooperative agreement which will permit them to have complete relief from the acreage limitations or to adjust their ownership of leases so as to afford some measure of relief for the nonoperating parties to the operating agreement. If so, consultation with the Geological Survey will, no doubt, be helpful. But until some change in the nature of their plans is evident, the decision of the land office should stand.

The Acting Director dismissed Columbian's protest and remanded the case for appropriate action to reduce the acreage held in excess of the permissible amount. In view of what has been said above, there is no necessity to take any action to reduce Columbian's holdings, but since the land office correctly computed the acreage charges, except in the respect noted, the dismissal of its protest was proper.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director is affirmed, as modified herein.

EDWARD W. FISHER,
Deputy Solicitor.

PAUL BLAKE

A-27882

*Decided October 24, 1961***Mineral Leasing Act for Acquired Lands: Generally—Oil and Gas Leases: Royalties—Oil and Gas Leases: Discretion to Lease**

An application for an acquired lands noncompetitive oil and gas lease is not properly rejected as not being in the public interest where the United States acquired the land subject to the reservation in the grantor of a perpetual royalty of 12½ percent in the oil, gas, and other minerals produced from the land, merely because, upon production from the leasehold, no royalties would be payable to the United States as the royalties reserved to the grantor are deductible from the total 12½ percent royalty payable to the United States under such a lease.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Paul Blake has appealed to the Secretary of the Interior from a decision of September 5, 1958, by the Director of the Bureau of Land Management affirming the rejection of the appellant's oil and gas lease application for 1,701 acres of land in Dallam County, Texas, filed pursuant to the Mineral Leasing Act for Acquired Lands (30 U.S.C., 1958 ed., sec. 351 *et seq.*)

The appellant's application was rejected on the ground that the issuance of a lease on the lands applied for was not in the public interest. According to the title records, these lands were conveyed to the United States, subject to a reservation of a perpetual royalty of 12½ percent in the oil, gas, and other minerals produced from the land. The Director's decision held that the total royalty payable by a lessee under a noncompetitive lease is 12½ percent as provided by section 17 of the Mineral Leasing Act, as amended by the act of August 8, 1946 (30 U.S.C., 1958 ed., sec. 226), and that royalties reserved in lands acquired by the United States are payable from the royalty charged by the United States, citing a decision of the Comptroller General of August 10, 1950 (30 Comp. Gen. 74).

The decision of August 10, 1950, held that where land is acquired by the Government subject to royalty reservations of the former owner for gas and oil produced therefrom, the liability of the lessee of such land for royalty payments is limited by section 17 of the Mineral Leasing Act, as amended (*supra*), to 12½ percent of all gas and oil produced from the land even though the royalty payments due the former owner on account of such reservations are deducted from the royalties payable to the United States. The decision involved lands acquired by the United States with a reservation to Petroleum County, Montana, of 6.25 percent royalty on oil and gas produced from the lands. The Department of Agriculture had formerly leased the lands under leases providing that the amount of the royalty payments reserved to the county should be deducted

October 24, 1961

from the royalties payable to the lessor. After the leases were transferred to this Department, the question was raised as to what the royalty charges should be under leases on these lands issued pursuant to the Mineral Leasing Act for Acquired Lands (letter of June 12, 1950, from the Secretary of the Interior to the Comptroller General). The Comptroller General's decision held that royalty payments of a lessee under a lease issued pursuant to the Mineral Leasing Act for Acquired Lands were limited to $12\frac{1}{2}$ percent, and that the royalty reserved to Petroleum County on the lands under consideration reduced by 6.25 percent the royalty to which the United States was entitled. In accordance with this decision, the Director's decision indicated that if a lease were to issue to the appellant in the instant case, and oil and gas were produced from the lands, the United States would be entitled to no royalties because the entire $12\frac{1}{2}$ percent royalty payable under the lease is reserved to the grantor of the land here involved.

On appeal, the appellant offers, in effect, to agree to pay the United States a small royalty of $2\frac{1}{2}$ percent on all oil and gas produced from the land in addition to the $12\frac{1}{2}$ percent royalty reserved to the grantor if the Department regards as essential the receipt of some royalty in the event of a discovery of oil or gas on this land. Although such an offer is not ordinarily considered initially on appeal, it may be noted that if the ruling in the Comptroller General's decision of August 10, 1950 (*supra*), is adhered to, that $12\frac{1}{2}$ percent royalty was intended to be the total royalty payable by a lessee on noncompetitive leases, the appellant's offer could not be accepted.

In the circumstances, would the issuance of a lease be in the public interest?

The Department of Agriculture, the agency administering the surface of the land, raised no objection to the proposed lease. There is nothing in the record to indicate that oil and gas development will adversely affect any interest the United States may have in this or other land.

The only apparent objection to the lease is that the United States will not share in royalties if the lessee must pay no more than a $12\frac{1}{2}$ percent royalty. On the other hand the United States will receive annual rentals from the land until a discovery is made.

Aside from monetary considerations there is a public interest in the development of oil and gas deposits in the United States. Furthermore in the absence of any United States interest requiring it, the United States ought not to obstruct the opportunity its grantor may have to realize the royalty he reserved merely because the United States will not share in the production of oil and gas.

Thus, it was incorrect to deny a lease to the appellant for the reasons given and, all else being regular, one should be issued to him.

Therefore, the decision of the Director, Bureau of Land Management, is reversed and the case remanded to the Bureau of Land Management for further proceedings consistent herewith.

JOHN A. CARVER, JR.,
Assistant Secretary of the Interior.

APPEAL OF FRAMLAU CORPORATION

IBCA-228

Decided November 1, 1961

Contracts: Appeals—Rules of Practice: Appeals: Generally

The Board of Contract Appeals lacks jurisdiction to reform contracts, but has jurisdiction to interpret contracts.

BOARD OF CONTRACT APPEALS

On October 31, 1961, Department Counsel moved timely for reconsideration of the decision of the Board of August 18, 1961, in the above-captioned appeal.

Department Counsel asserts that the Board lacks jurisdiction to reform a contract, and that expert engineering testimony is not admissible to establish the correct legal interpretation of a written contract.¹ In both of these propositions the Board agrees. Concerning the reformation of contracts the Board has repeatedly stated that it lacks jurisdiction.² And the Board was careful to point out in its original decision of August 18, 1961, on page 17, that the

Board was aided mainly by the material submitted to it by the appellant and by the testimony of appellant's expert witnesses. *However*, although the Board's conclusions parallel those of appellant's expert witnesses, the Board has arrived independently at its conclusions.

In fact, the Board cited *National U.S. Radiator Corp.*, ASBCA No. 3972, October 21, 1959, where it was stated:

In the interpretation of a contract * * * the proper role of an expert witness is to assist the fact-finding tribunal in arriving at the correct interpretation by giving the tribunal information and advice on such matters as the meaning of technical terms used in the trade and the customs and usages of the trade, rather than for the witness himself to interpret the contract.

¹ Citing 1 Govt. Contr. 883 (June 15, 1959).

² *United Concrete Pipe Corporation*, IPCA-42, May 31, 1956, 63 I.D. 153, 160: "The Board has held that it lacks jurisdiction to reform instruments such as bids [*L. D. Shilling Company, Inc.*, IBCA-23, August 19, 1955, 6 CCF par. 61, 695] or change orders [*Sam Bergesen*, IBCA-11, August 1, 1955, 62 I.D. 295, 304] on the ground of mutual mistake." However, the Board held: "a release which the contracting officer should not have accepted must be regarded as the unilateral act of the contractor, which may be disregarded by the administrative reviewing authority upon appeal."; *Samuel N. Zarpas*, IBCA-24, January 4, 1956, 63 I.D. 1, 6, 6 CCF par. 61, 756; *R. P. Shea Co.*, IBCA-37, November 30, 1955, 62 I.D. 456.

November 2, 1961

The substantial evidence on which the Board relied in its decision is set forth, in part, verbatim in the decision.

Although the Board has no jurisdiction to reform a contract, the Board has authority to interpret a contract so as to determine what performance is called for by the terms of the contract. There "is a well-recognized distinction between contract interpretation and contract reformation".³ "Interpretation is determining the true meaning of the contract as applied to the specific situation; reformation is changing the terms of the contract in accordance with principles applied by courts of equity"⁴ or by the Comptroller General.⁵

In the instant appeal we were confronted, among other things, not with the reformation of the bid, but with the question of contract interpretation. In view of numerous confusing and confused circumstances created by the Government, which the Board enumerated on pages 17-18 of its original decision, the Board applied the rule of interpretation *contra proferentem*. Consequently, the Board assumed jurisdiction.

Further consideration of the appeal is not warranted, since the Board in rendering its original decision fully considered all aspects of the appeal. Nothing is presented which was not before the Board at that time.

The motion for reconsideration is accordingly denied.

PAUL H. GANTT, *Chairman*.

I concur:

THOMAS M. DURSTON, *Member*.

EDWIN G. GIBBS

A-28716

Decided November 2, 1961

Oil and Gas Leases: Acreage Limitations

In the absence of a withdrawal of an oil and gas lease offer, the offeror is charged with the acreage of his offer or simultaneously filed offers until the decision of the land office rejecting the offer or offers becomes effective at the end of the period for taking an appeal.

³ *Dunlap and Associates, Inc.*, ASBCA No. 4903, June 25, 1959, 59-2 BCA par. 2277, Motion for Reconsideration, November 25, 1959, 59-2 BCA par. 2416. Cf. *L. D. Shilling Company, Inc.*, IBCA-23, August 19, 1955: "While it is well-settled that a contractor may not advance a claim which has not been excepted, or increase its amount, this doctrine should not be pushed so far that a contractor may not on appeal invoke a legal theory in support of a claim that has not been mentioned in the letter which is the basis of the exception. To permit this is not, as the Government contends, a reformation of the release, but an interpretation thereof." (Italics supplied.)

⁴ *Prestee, Inc.*, ASBCA No. 6572, January 30, 1961, 61-1 BCA par. 2937.

⁵ *R. P. Shea Co.*, cited *supra*, fn. 2 at 463; *L. D. Shilling Company, Inc.*, cited fn. 2 *supra*.

Oil and Gas Leases: Applications—Oil and Gas Leases: Acreage Limitations

Where oil and gas offers are rejected because they did not draw top priority at a drawing of offers simultaneously filed and new offers are filed before the first offers are withdrawn or the time period has run for appealing from the rejection of the first offers, the new offers must be rejected if they together with the first offers exceed the acreage limitation prescribed by regulation.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Edwin G. Gibbs has appealed to the Secretary of the Interior from a decision of the Acting Director of the Bureau of Land Management dated October 11, 1960, affirming a decision of the land office at Salt Lake City which rejected his noncompetitive oil and gas lease offers, Utah 046607 and 047994, filed on April 25, 1960, because, when added to his other holdings in the State of Utah, these filings caused his holdings to exceed the acreage limitation set by the Department's regulation 43 CFR, 1960 Supp., 192.3.

The record in this case shows that Gibbs filed 26 oil and gas lease offers simultaneously on March 28, 1960. The acreage of land described in these offers totaled 41,198 acres and, with the acreage that was then chargeable to him, comprised 55,638 acres. On April 6, 1960, the land office issued a decision declaring that Gibbs' holdings became in excess of the maximum of 46,080 acres permitted by regulation (43 CFR, 1960 Supp., 192.3(a)) with the simultaneous filing of the 26 offers on March 28, 1960. The decision continued in these words:

* * * In accordance with Sec. 192.3(e)(2), the offers are held for rejection in their entirety. The rental check is returned herewith on each of these offers.

This decision becomes final 30 days from its receipt and the cases will be closed on our records unless (1) a statement is filed in accordance with Sec. 192.3(d) satisfactorily showing that our acreage figures are in error, or (2) an appeal to the Director, Bureau of Land Management, is filed.

On April 25, 1960, Gibbs filed simultaneously 14 additional oil and gas lease offers, totaling 15,867 acres. On April 29, 1960, he withdrew 13 of the 26 offers filed on March 28, 1960. On May 12, 1960, after the expiration on May 9, 1960, of the 30-day period allowed for taking an appeal from the decision of April 6, 1960, the land office closed its records on the remaining offers filed on March 28, 1960. On June 9, 1960, the land office issued an additional decision holding the offers filed simultaneously on April 25, 1960, to be in excess of the acreage limitation permitted by departmental regulation when added to previous holdings and the offers of March 28, 1960, and rejecting them in their entirety. This decision specifically rejected the two applications listed above which had been drawn first in drawings of simultaneously filed offers.

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Gibbs appealed, contending that the land office had rejected some of his March 28 offers and returned the rentals prior to its decision of April 6, 1960, and that, accordingly, the land office was in error in charging him with the acreage of these offers until 30 days after the decision of rejection. He says that the land offices do not post the acreage of oil and gas offers on the land office records until after the drawing of simultaneously filed offers is held and then only the offers drawn first and second are posted.

The Acting Director affirmed the land office, pointing out that by the terms of the land office decision of April 6 the rejection of the offers of March 28 took effect at the expiration of the 30 days allowed for an appeal in the absence of appeal, a withdrawal or a showing that the chargeable acreage was erroneously computed.

In this appeal, Gibbs has merely reiterated his contentions.

The applicable departmental regulation which was effective on March 28 and April 25, 1960, reads in pertinent part:

If any person holding or controlling leases or interests in leases only, or applications or offers for leases only, or both leases or interest in leases and applications or offers, below the acreage limitation provided in this section, files an application or offer, or a group of applications or offers (filed simultaneously), which causes him to exceed the acreage limitation, the application or offer, or group of applications or offers, causing the excess holding, will be rejected in its entirety. (43 CFR, 1960 Supp., 192.3(e) (2).)¹

It is clear that on March 28, when this appellant filed his offers which caused the acreage chargeable to him to exceed the limitation imposed by departmental regulation, the land office was not permitted to afford him an opportunity to reduce his holdings or control so as to conform to the limitation. It was required to reject in its entirety the group of simultaneously filed offers which caused the excess. And this is what the land office did. Because of the rejection, the appellant became entitled to a period of 30 days in which he might perfect an appeal if he chose to do so. The land office decision also invited him to submit within the appeal period evidence showing that its computation of chargeable acreage was erroneous but, even in the absence of notice or a direct invitation to proceed in this manner, the appellant could have taken such action at any time within the appeal period in lieu of an appeal. If he desired to do neither of these things and wished to restore his eligibility for oil and gas leasing, the proper action, as the Acting Director observed, would have been to withdraw all of the lease offers filed on March 28, 1960, in advance of the filing of additional offers, thus terminating the

¹ Before this provision was incorporated in the regulations, effective February 12, 1959, the pertinent provision of the regulation, 43 CFR, 1954 Rev., 192.3(c), provided that a person found to hold or control accountable acreage in excess of the prescribed limitation "shall be given thirty days within which to file proof of the reduction of his holdings or control so as to conform with the prescribed limitation."

appeal period by pursuing a course inconsistent with appeal. The appellant did not do this. After the appellant filed his April 25 offers, he did on April 29, within the appeal period, withdraw 13 of his March 28 offers. Accordingly, the land office decision did not become final as to the remaining 13 March offers until the expiration of the appeal period (43 CFR, 1960 Supp., 221.101) and the appellant remained charged with the acreage listed in these offers during that period. He was chargeable with the first group of March 28 offers until he withdrew them on April 29, 1960.

As his subsequent April offers were filed when he was already in violation of the acreage limitation, they were properly rejected.

There remains for discussion one other point. In his briefs on appeal to the Director and to the Secretary, the appellant states that, prior to the April 6, 1960, decision, letters were sent to him for all of his offers not drawn first or second in the March simultaneous drawing, rejecting each of such offers and returning the advance rental payment. It is these offers, he says, which he withdrew on April 29, 1960. He further asserts that it has been the practice in the Salt Lake City and other land offices not to include in an offeror's acreage account offers on which rejection notices have gone out and the checks returned. If, he continues, these offers are dropped from his acreage account, then the total remaining when added to his April filing did not cause him to exceed the allowable maximum.

The basis of the appellant's argument is that, once his offers were rejected and the rentals returned, the acreage such offers described was no longer chargeable to him. While he alleges that the land offices have followed that practice, he has not referred to any ruling by the Director or the Secretary affirming it. Nor are there copies of the asserted letters of rejection in the case files.

Even if it is assumed that the rejection of a simultaneously filed offer and the return of the rental payment is a final action by the manager, it does not follow that chargeability for the acreage in such an offer terminates on the date of the manager's letter.

As pointed out above, the Department's rules of practice provide that:

Normally a decision will not be effective during the time in which a person adversely affected may file a notice of appeal, and the timely filing of a notice of appeal will suspend the effect of the decision appealed from pending the decision on appeal. * * * 43 CFR, 1960 Supp., 221.101.

Since an appeal from a manager's decision may be taken within 30 days from the date on which the decision appealed from is served on the person taking the appeal (43 CFR, 1960 Supp., 221.2), any action rejecting the Gibbs' offers did not become effective until 30 days after he was served with it. While the date on which he received the manager's letters is not in the record, it must be less than 30 days

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prior to April 25, 1960, because the rejected offers were filed on March 28, 1960, leaving an interval of less than 30 days in which the March simultaneous filing was held and the unsuccessful offers, including some of Gibbs', rejected. Thus on the date that Gibbs filed his offers for the April drawing, the decisions rejecting his unsuccessful March offers were not final and all the March offers were still in full force and effect. As pending offers they remained fully chargeable to him. That Gibbs himself regarded them as still in effect is indicated by the fact that on April 29, 1960, he withdrew 13 of the offers. There would be no point in withdrawing offers that had been finally rejected at earlier dates.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (sec. 210.2.2A(4)(a), Departmental Manual; 24 F.R. 1348), the decision of the Acting Director is affirmed.

EDWARD W. FISHER,
Deputy Solicitor.

APPEAL OF SPAW-GLASS, INC.

IBCA-282*Decided November 3, 1961*

Contracts: Buy American Act

In determining issue as to whether or not concrete piling composed of domestic steel, domestic concrete, and foreign stressing strand is manufactured domestic construction material within the meaning of the Federal Procurement Regulations and the Department of the Interior Manual, contracting officer must make his determination not only under 41 CFR 1-6.202-2, but also must apply definition of "Domestic construction material" in 41 CFR 1-6.201(d).

Contracts: Contracting Officer—Rules of Practice: Generally

A decision of a contracting officer "cannot be treated as a final decision" when contracting officer fails to comply with Departmental Manual and Federal Procurement Regulations.

Contracts: Contracting Officer—Rules of Practice: Generally

Decision of the contracting officer must be supported by evidentiary facts. These facts should be stated in sufficient detail to enable the Board, as well as the contractor, to understand the basis of the contracting officer's decision.

Rules of Practice: Appeals: Generally

In assembling appeal file contracting officer must include "Correspondence and other data material to the appeal." 43 CFR 4.6.

BOARD OF CONTRACT APPEALS

The above-identified contract of December 29, 1960, provided for the construction of a Sea Water Laboratory at Galveston, Texas. The estimated contract price amounted to \$120,435.

During the performance of the contract,¹ contractor-appellant submitted to the contracting officer for approval on February 2, 1961, a purchase order for 16" and 14" square prestressed concrete piling with Texas Concrete Co., Inc. of Victoria, Texas.²

On February 7, 1961, Lawrence E. Wise, who identified himself as "Administrative Officer, Biological Laboratory,"³ rejected the proposed purchase order and wrote to the contractor-appellant, in part, as follows:

We are returning the photostatic copy of the Mill Certificate and Cable Data from Shinko Wire Co., Ltd. as rejected for the following reason. Standard Form 23A, General Provisions (Construction Contracts), in Item 17 covers the Buy American Act which basically provides that only domestic construction material will be used by contractors, subcontractors, material men, and suppliers.

In addition to the above and for future reference mill certificates on construction materials such as steel must be for the specific job and the specific lot number that will be incorporated into the job. In other words we would require a mill certificate on the steel and cable that was actually being incorporated into the building.

On February 14, 1961,⁴ Mr. Wise wrote to the subcontractor as follows:

Your letter of February 10 in regard to Contract No. 14-17-0007-16, Sea Water Laboratory, Galveston, Texas and, more specifically, the prestressed concrete piling for this project has been received and reviewed.

My letter of February 7 to Spaw-Glass, Inc. rejecting the proposal for Japanese steel because of the Buy American Act was based on the assumption that piling could be defined as a "construction material" and not a manufactured item. My reasoning of a manufactured item would be an "off the shelf" item rather than something that is produced to exact specifications as to all components as in the case of piling.

A copy of my letter of February 7, your answer of February 10, and this letter is being forwarded air mail to our Regional Office this date for a decision.

Assuming that piling is a manufactured item and to expedite approval of foreign steel in this piling we will require a breakdown of the cost of the components to determine whether or not components manufactured in the United States exceed 50 percent of the cost.

¹ Appellant's counsel has advised the Board, and the Board has been advised by the Bureau of Commercial Fisheries that the contract is about to be closed out. The pending of a dispute does not, of course, prevent final acceptance.

² Hereinafter referred to as the "subcontractor."

³ The appeal file is incomplete as will be pointed out further. Hence, it does not appear with clarity what are the functions of various persons in the administration of the contract. Some contract papers are signed by "K. A. Lawrence, Chief, Branch of Property Management, Bureau of Commercial Fisheries." Other contract correspondence is signed by Mr. Lawrence E. Wise as indicated in the body of this opinion. Further, the so-called decision of February 20, 1961 is signed by "Chester E. Danes, Representative for the Contracting Officer." It is assumed that all these persons were on the contracting officer's team and had authority to act pursuant to Clause 1(b), of Standard Form 23 A (March 1953).

⁴ This letter was not presented as part of the appeal file, but appended to the brief of appellant's counsel of July 11, 1961. It seems obvious that the letter should have been included in the appeal file as part of the "Correspondence and other data material to the appeal" required to be submitted pursuant to 43 CFR 4.6.

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The delay is regretted, however this must necessarily be submitted to higher authority.

By letter of February 15, 1961, the subcontractor submitted the requested breakdown concerning the prestressed concrete piling which, in its pertinent part, reads as follows:

As per your letter of the 14th requesting a breakdown of the cost of the components that we propose to use in the piling that we have been commissioned to manufacture for Spaw-Glass Co., we are itemizing below the costs and percentages of the product costs:

Mild Steel (domestic)-----	\$.16 per ft. of piling----	} 53.3%
Concrete (domestic)-----	1.05 per ft. of piling----	
Stressing strand (foreign)-----	1.66 per ft. of piling----	46.7%

On February 20, 1961, the following letter was sent to appellant, received on February 22, 1961:

Contract No. 14-17-0007-16
Construction of Galveston Sea Water Laboratory

Gentlemen:

We have reviewed the correspondence between the Texas Concrete Company, Inc., and our Biological Laboratory at Galveston concerning the company's request for using foreign-made steel in the prestressed piling for the sea water laboratory which is currently under construction.

Generally speaking, the Buy American Act requires that only domestic construction material shall be used in the performance of a construction contract. Also, as a general rule, only domestic component parts are allowed. There are, of course, exceptions to the above. For instance, if one of the component parts was not mined, produced, or manufactured in the United States in sufficient and reasonable commercial quantities and of satisfactory quality, then the Government would allow a foreign component to be used. In this specific instance, American-made steel is not in short supply, is readily available, and of satisfactory quality. Invitation for Bids No. OF-2-15, which is a part of Contract No. 14-17-0007-16, did not indicate that the Government would accept construction items of foreign nature.

In view of the above, it is our determination that only American-made steel shall be used in the performance of this contract.

A copy of this letter is also being furnished to the Texas Concrete Company, Inc., P.O. Box 53, Victoria, Texas.

Very truly yours,

/s/ C. E. Danes
CHESTER E. DANES,
Representative for the
Contracting Officer.

On March 22, 1961, the contractor appealed as follows:

Secretary, Department of the Interior
% Chester E. Danes
Representative for the Contracting Officer
Bureau of Commercial Fisheries
P.O. Box 6245
St. Petersburg Beach, Florida

Re: Contract No. 14-17-0007-16
A Sea Water Laboratory
Galveston, Texas
Appeal of Contracting Officer's Decision

Gentlemen:

In accordance with Paragraph No. 6 of Standard Form 23A, General Provisions (Construction Contracts), we hereby appeal the decision of the representative of the Contracting Officer on the above named project dated 20 February 1961 and received in this office on 22 February 1961.

We have proceeded diligently with the performance of the Contract and in accordance with the Contracting Officer's decision and we hereby request a modification to the above Contract to cover the following additional expenses incurred:

	<i>Material & Equip.</i>	<i>Labor</i>
Premiums paid for domestic cable furnished in lieu of foreign cable in original bid-----	\$1,013.00	
<i>Extra Job Expenses:</i>		
Period beginning February 8, 1961, date of receipt of disapproval on cable submitted; and ending February 22, 1961, date of receipt of Contracting Officer's Determination that General Contractor furnish piling manufactured with domestic cable.		
Job Superintendent, 2 wks-----	@175.00	\$350.00
Pick-Up Truck, 2 wks-----	@25.00	50.00
605 Koehring Crane, (1½ CY) ½ Mo-----	@2,000.00	1,000.00
	\$2,063.00	\$350.00
11.5% Labor Ins., Taxes, Etc-----		40.00
Total Mat. & Equipment Cost-----		2,063.00
Job Cost-----		\$2,453.00
5% General Office Overhead-----		123.00
		\$2,576.00
10% Profit-----		258.00
		\$2,834.00
0.65% Bond Premium Increase-----		18.00
Total Extra Requested-----		\$2,852.00

A photostatic copy of the letters and invoices concerning the above are enclosed for your reference and files.

Your earliest attention to this request will be greatly appreciated.

Yours very truly,

SPAW-GLASS INC.
By /s/ George Glass
GEORGE GLASS

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Counsel for the appellant in its brief of July 11, 1961, alleged the following concerning the process for manufacturing prestressed concrete piling "while well known." The process takes place on a level casting bed 30' to 40' wide and approximately 300' long; at both ends of the casting bed are located H-beam steel or concrete jacking walls (or buttresses); wire cable is strung between the two jacking walls, one end tied off and jacks are placed at the opposite end for the purpose of creating stress and tension on the cables; steel ties are wrapped around the cables; bulkheads for spacing are constructed in accordance with the length of piling specified; side forms of wood or generally steel are erected; jacks are then utilized to pull the wire cables to the prescribed tension; concrete is then poured into the forms; the top is finished off; the piling is covered with wet mats for 7 days (or the concrete is otherwise cured by steam in a shorter period of time); after the concrete is cured, the jacks are released on the cables and the cables are cut at the location of the bulkheads; the forms are torn down and the finished prestressed concrete pilings are lifted on trucks and hauled to the jobsite. The process normally utilizes a crew of 4 to 5 men.

The Federal Procurement Regulations, 41 CFR 1-6.201(d), define "Domestic construction material" to mean—

an unmanufactured construction material which has been mined or produced in the United States, or a manufactured construction material which has been manufactured in the United States if the cost of its components which are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components.

It is the intent of these regulations to apply this definition in addition to 41 CFR 1-6.202-2, which provides as follows:

In determining whether a construction material is a domestic construction material:

(a) Only the construction material and its components shall be considered.

(b) A component shall be considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the construction material in which it is incorporated is manufactured in the United States and the component is of a class or kind determined by the agency concerned to be not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

The Departmental Manual,⁵ in identical language, prescribes the same tests in DM 403.5.10.D and 403.5.12.

Consequently, the issue presented in this appeal is whether or not prestressed concrete piling, alleged to have been manufactured in Lufkin, Texas, contains components which are mined, produced, or manufactured in the United States and which exceed 50 percent of

⁵The Departmental Manual also contains guidance for the application of the Buy American Act, 41 U.S.C. 10a-10d, and of Executive Order No. 10582, December 17, 1954, 3 CFR 1954 Supp., p. 96, to supply contracts.

the cost of all its components. If appellant is able to establish that the prestressed concrete piling is "domestic construction material," then appellant is entitled to a compensable change order to be issued by the contracting officer. Otherwise, the claim should be denied by the contracting officer since 41 CFR 1-6.202-4 "Noting exceptions and findings," generally, is available only prior to the award and execution of the contract.

It is obvious that the contracting officer's decision did not dispose of the issue and represents "a mere conclusion and is wholly unsupported by evidentiary facts. These should have been set forth in sufficient detail⁶ to enable the Board, as well as the contractor, to understand the basis for the conclusion."⁷

In view of the failure of the contracting officer to comply with the departmental manual instructions and with the Federal Procurement Regulations, the letter of February 20, 1961 "cannot be treated as a final decision of the contracting officer."⁸

In passing, the Board comments on the following statements which appear in the letter of Mr. Wise of February 14, 1961, quoted *supra*.

1. "The delay is regretted, however, this must necessarily be submitted to higher authority."

A contracting officer must be free to make his own decision. If the use of certain material is directed by "higher authority" even if the contract documents are not sufficiently restrictive to preclude certain construction material, such a direction or prevention of the use of such construction material would amount to a compensable change.⁹

2. My letter of February 7 to Spaw-Glass, Inc., rejecting the proposal for Japanese steel because of the Buy American Act, was based on the assumption that piling could be defined as a "construction" material and not a manufactured item. My reasoning of a manufactured item would be a "off the shelf" item rather than something that is produced to exact specifications as to all components as in the case of piling.

The definition applied to the word "manufacture" is too narrow. Appellant's counsel has presented the definition of manufacture which appears in Webster's Collegiate Dictionary, 5th Edition, as follows:

The process of making wares by hand, by machinery, or by other agency, often with division of labor and the use of machinery.

⁶ The Board is unable to determine from the appeal file whether the subject contract contains Clause 17 "Buy American Act" of Standard Form 23A (March 1953) or the Clause prescribed by 41 CFR 1-6.205.

⁷ *Paul C. Helmick Company, IBCA-39 (July 31, 1956), 63 I.D. 209, 245, 56-2 BCA par. 1027.*

⁸ *Bostwick-Batterson Company v. United States, 283 F. 2d 956, 959 (Ct. Cl., 1960); see Framlau Corporation, IBCA-228 (August 18, 1961).*

⁹ *General Installation Company, Eng. BCA No. 1295, June 30, 1959.*

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The Comptroller General of the United States, in 39 Comp. Gen. 435 (1959), has pointed out that the question as to what constitutes the "manufacture" of an item is "by no means easy to determine." However, in the same decision,¹⁰ he makes the following observations which may serve as guidance for the contracting officer:

* * * The question as to what constitutes the "manufacture" of an item is by no means easy to determine. In early times the word "manufacture" was generally related to the production of an article directly from raw materials, but it has now been held that even the mere assembly of parts previously manufactured may be regarded as a manufacture of the completed article. See 55 Corpus Juris Secundum, pages 680 to 685. No regulations have been issued, nor have any criteria been established, as in the case of the purchase of foreign products, to facilitate the determination as to what constitutes manufacture. Probably most of the work here involved in producing a wire rope assembly from the raw product is the work involved in, and leading up to, the production of metal thread from which a strand of rope, and then the finished rope, is produced thereafter by a series of twisting operations. We have been advised informally by a representative of your firm that you do not manufacture the wire thread but perform only the twisting operations in the production of wire rope. The fact that the Bureau of Customs may classify the finished product here as wire rope for the purpose of collecting duty is not controlling in determining whether Fleming is a manufacturer.

The Department Counsel has questioned the timeliness of the appeal and has moved to dismiss the pending appeal for failure to comply with 43 CFR 4.5.

The Board has examined the original of the notice of appeal which has been submitted *dehors* of the appeal file by the contracting officer on May 2, 1961. The official stamp of the Bureau of Commercial Fisheries, St. Petersburg, Florida, appears in the upper right corner and establishes the timeliness of the appeal.

The Board would, in all likelihood, have denied the motion to dismiss on the basis of the basis of the *General Excavating Company*,¹¹ holding that claim letters when read together with the contracting officer's decision make the issue determinable and "meet the minimum requirement of the notice of appeal."¹² However, it is not necessary to do so, since in the instant appeal the letter of appellant's counsel of July 11, 1961, has cured whatever defect there may have been in the notice of appeal. Hence, all motions of the Department Counsel to dismiss are denied.

¹⁰ 39 Comp. Gen. 435, 437-438 (1959); Cf. M-36488, March 17, 1958; Gantt, Speck, *Domestic v. Foreign Trade Problems In Federal Government Contracting: Buy American Act and Executive Order*, 7 J. Pub. Law 378, 384 (Fall 1958).

¹¹ IBCA-188, August 15, 1960, 60-2 BCA par. 2754, 2 Govt. Contr. 469.

¹² *Midland Constructors, Inc.*, IBCA-272, May 3, 1961, 61-1 BCA par. 3012, 3 Govt. Contr. 358(c); *Weidfab, Inc.*, IBCA-268, April 11, 1961, 68 I.D. 107, 61-1 BCA par. 2005, 3 Govt. Contr. 298(k).

For the reasons stated above, the appeal is remanded to the contracting officer to proceed in accordance with the views stated in this opinion and to issue an appropriate findings of fact and decision on the claim of contractor-appellant.

PAUL H. GANTT, *Chairman.*

I concur:

THOMAS M. DURSTON, *Member.*

APPEAL OF CONTINENTAL OIL COMPANY**IA-1014***Decided November 8, 1961****Indian Lands: Oil and Gas Leasing (Tribal Lands)**

Where an oil and gas lease of unsurveyed land describes the leased property by metes and bounds but contains a rider stating that when the property is surveyed the description will be by sections, the section description will control upon completion of the survey and the metes and bounds description will be considered as having served only a temporary purpose.

APPEAL FROM THE BUREAU OF INDIAN AFFAIRS

The Continental Oil Company of Denver, Colorado, has appealed to the Secretary of the Interior from a decision of the Commissioner of Indian Affairs, dated October 27, 1958, upholding a decision of the Area Director on a boundary dispute which was adverse to Continental.¹ As the boundary dispute resulted from Continental's claim to a strip of land which is either in the north part of its Navajo Tribal oil and gas leases or in the south part of leases held by Phillips Petroleum Company and Aztec Oil and Gas Company, these latter two companies were permitted to file a joint brief in opposition to Continental's brief. The strip of land in question is about 624 feet wide and four miles long, and contains approximately 300 acres. The Commissioner's decision also had the effect of denying Continental the right to drill its Navajo B-8 Well, and of approving the drilling of Phillips' No. 10-A Desert Well.

The additional area claimed by Continental results from a metes and bounds description employed by it in a private survey. A survey following section lines, however, does not show any conflict with the Phillips-Aztec leases. Both types of survey plats were filed by Continental with the Area Director at Window Rock, Arizona, and the Regional Oil and Gas Supervisor at Roswell, New Mexico. The metes and bounds survey plat was filed about six months after the section line survey plat. It is the later metes and bounds survey which is relied upon by Continental in this appeal. In the official boundary survey made by the Bureau of Land Management and approved May 10, 1954, the shortages in the distance between the north and south boundaries had to be put in the south tier of quarter sections because in an earlier official survey the township and section lines in the northeast part of the township had been surveyed and laid out. The area reduced by this cadastral survey was moved by Continental to a strip north of its north boundary to give rise to its claim.

*Not in chronological order.

¹ The original decision was by the Regional Oil and Gas Supervisor, U.S. Geological Survey, and was upheld by the Area Director.

It should be stated at this point that in the advertisement for bids the leases were described by metes and bounds. Such descriptions were qualified, however, in several important respects. They were, for instance, prefaced by the following paragraph:

Point of origin to which most of the unsurveyed portion of the following tract is referred and described is the common corner of the States of Utah, Colorado, New Mexico and Arizona, which is marked by a General Land Office monument. Some tracts consisting of partially surveyed and partially unsurveyed lands are described from a survey township corner.

The descriptions were then followed by the following rider, which is likewise contained in each lease:

1. This land was offered on a tract basis and the bids were not on an acreage basis. The acreage herein stated is for the sole purpose of computing annual rental prior to survey of the land. Thereafter the rental shall be computed on the acreage as shown by the survey. No refund or additional payment of rental shall be required to be made because of a difference in the acreage stated and that shown by the survey. Neither shall such a difference in acreage be grounds for any adjustment of the bonus.

2. Prior to the commencement of the drilling of a well the lessee shall have the leased premises surveyed by a registered land surveyor, boundaries posted with substantial monuments, and a tie established with the nearest United States Public Land Survey. Certified copies of the survey plats must be filed in duplicate with the Area Director, Window Rock, Arizona, and in duplicate with the Supervisor, U.S. Geological Survey, P.O. Box 6721, Roswell, New Mexico. Failure to comply with this provision will render the lease subject to cancellation in the discretion of the Commissioner of Indian Affairs. Permission to drill will not be granted by Supervisor prior to receipt of certified copy of survey plat.

Also included in the descriptions of Continental leases No. 14-20-603-407 and No. 14-20-603-409 was the following as to Tract No. 88:

Tract No. 88 when surveyed probably will be described as follows:

Sections 29, 30, 31 and 32 of T. 41 S., R. 24 E., S.L.M. and containing a total of approximately 2560 acres.

A similar provision was attached to Tract No. 97, reading as follows:

Tract No. 97 when surveyed probably will be described as follows:

Sections 27, 28, 33 and 34 of T. 41 S., R. 24 E., S.L.M. and containing a total of approximately 2560 acres.

As the Commissioner has pointed out in his decision, when a township is surveyed against previously established lines exterior sections may be of varied size. In surveying townships which were previously partly surveyed, the north-south overages or shortages are usually placed in the north end of the township. However, this rule may be varied when conditions warrant, and the overages and shortages placed in the south end of the township. This was

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done in the instant case because it was desired to (1) provide a plan which would satisfy the basic laws on surveys and the established procedures of the Bureau of Land Management; (2) provide maximum regularity so that future subdivisional surveys of section, tract or lease boundaries would be facilitated; and (3) to give substantial compliance with the greatest number of tract boundaries which are described in detail and delineated in the Navajo lease sale advertisement. Thus, the projected survey of the southerly quarter sections was minus the approximate 624-foot strip referred to, but the area was included in the metes and bounds description.

Prior to approval of the leases herein involved, a group of oil companies requested that a public land survey be made of the area by the Bureau of Land Management. Such survey was to be of township boundaries only, with section and quarter section corners established on the perimeter, but was not to include an interior section survey. This survey was undertaken by the Bureau of Land Management between August 7 and November 3, 1953, and it was pointed out in the preliminary discussions that with the township boundaries established, any private or company surveyor could locate wells and lease tract boundaries within such township. The oil companies, of which Continental was one, paid for the Bureau of Land Management survey.

On the basis of the township boundaries thus established, both Continental and Phillips-Aztec, preparatory to drilling, filed private surveys following section lines. These surveys coincided as to the boundaries of the respective leases, and no conflict developed until Continental filed a subsequent metes and bounds survey which included the approximate 624-foot-wide strip.

The Commissioner, in his decision, stressed the point that it was the intent of the leasing operation to make boundaries conform to the United States public land surveys as required by 25 CFR 171.8. The advertisements indicated that a survey would be made and would probably include certain designated sections. Metes and bounds descriptions, the Commissioner held, were used in the advertisements solely for the purpose of locating the unsurveyed lands as closely as possible until surveyed.

It is Continental's position that with approval of its leases on December 10, 1953, it became a party to binding lease contracts which were subject to no modification or further interpretation. Most of the authorities cited by Continental deal with general rules of contract construction which are generally recognized and about which there is no dispute in this case. What Continental fails to take into consideration, however, is that these contracts on their face provided for certain procedures to be followed and for modifications if found

necessary. The following points, all in the advertisements for bids and incorporated in the leases, are illustrative:

1. It was clearly indicated that a survey was to be made which would describe the leased areas by sections rather than by the original metes and bounds description.

2. The area covered by a lease was to conform to the system of public land surveys.

3. The land was offered on a tract basis and the bids were not on an acreage basis, the acreage being stated for the sole purpose of computing annual rental prior to a survey.

4. Agreement to "abide by and conform to any and all regulations of the Secretary of the Interior now or hereafter in force relative to such leases."

When these conditions are given their full force and effect, it is seen that the contract has more elasticity than Continental appears to recognize. By the simple expedient of filing a survey based on metes and bounds, it undertakes to make these provisions of the contract meaningless. Such conditions were not only intended to have meaning but also serve to show that it was the intent of the parties to conduct the leasing operations in a manner which would eliminate conflict and overlapping. Intent, it is recognized in the briefs, is an important element of contract construction.

Aside from the numerous Federal and State decisions cited by the parties, reference is made to several rulings by the Bureau of Land Management. The parties are in complete disagreement as to the interpretation of these rulings and their applicability to the instant case. However, since these cases relate to the leasing of unsurveyed public lands on a noncompetitive basis under the Mineral Leasing Act of 1920, it is not believed they have any bearing on tribal oil and gas leases, with specific conditions applicable, and where the bidding is made after notice and advertisement calling for sealed bids. (See 25 U.S.C. 396 (a to f).)

Continental states that until there has been an official interior section survey, the land covered by leases cannot be identified by legal sections. This ignores the surveying rule that where four sides of a survey have been established, the interior lines may be accurately projected. Such a position also disregards some of the provisions of the manual of instructions of the Bureau of Land Management, which are in accepted usage. For instance, the manual provides in section 8 as follows:

Fourth. That the center lines of a regular section are to be straight, running from the quarter-section corner on one boundary of the section to the corresponding corner on the opposite section line.

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Section 162 of the manual contains this provision :

(d) For position, corresponding section corners upon the opposite boundaries of the township to be so located that they may be connected by true lines which will not deviate more than 21' from cardinal.

Continental also contends that surveys should be extended from south to north and from east to west. This is normally true but the rule is not inviolate. The manual, at section 225, treats the subject in the following manner :

* * * Preference should be given to extending all surveys from south to north and from east to west, but if a better control is available by reversing on one or both directions, thus resulting in a simpler and better survey in respect to minimizing the number of extra corners as fractional lots, such reversal of procedure is fully warranted.

That Continental recognized the propriety and legality of lease descriptions by sections which conform to the system of public land surveys is shown by its conduct in drilling its Davis No. 1 Well. In December 1956, having filed its survey plat showing sections, Continental applied for and was given permission to drill the Davis No. 1 Well. This well was a producer by March 1957 and it was not until August 1957, that Continental submitted its survey plat by metes and bounds, which would give it access to the 624-foot strip. Having once asserted a boundary line and acted in accordance therewith to its benefit, it is difficult to see how Continental can later claim a different boundary, particularly when it is in conflict with boundaries recognized as having been established by other lessees and acted upon by them.

Continental emphasizes that it has at all times paid and the lessor, Indian Tribe, has accepted rental on each of its leases on the basis that each of its leases contained 2,560 acres. This could have no possible bearing on the rights of Phillips-Aztec in the present boundary dispute. The payment of rentals would be based upon the provisions of the leases, which stipulate that after a survey had been made, rental would be computed on the basis of acreage as shown by the survey.

Continental also claims some sort of preference over Phillips-Aztec because its leases bear an earlier date. These leases were only part of a number of leases disposing of 528,000 acres of land. All were advertised at the same time and constituted a single operation. The dates of issuance could be no more than a matter of processing.

On May 24, 1960, at the request of Continental, an oral argument in the case was had before the Deputy Solicitor in Washington, D.C. All three of the oil companies were represented by counsel at the argument, which was also attended by representatives of the Bureau

of Land Management and the Bureau of Indian Affairs. The arguments presented were confined for the most part to emphasis of points which had been made in the original briefs, and nothing significant in the way of new material was offered.

Accordingly, the appeal of Continental is dismissed, and the decision of the Commissioner of Indian Affairs affirmed.

JOHN A. CARVER, JR.,
Assistant Secretary of the Interior.

APPEAL OF ERHARDT DAHL ANDERSEN

IBCA-223

Decided December 1, 1961

Contracts: Interpretation

Understandings or thoughts of one party to a contract, of which the other party was reasonably unaware, cannot serve as a foundation for binding the latter to the meaning which the former placed on the words of the contract.

Contracts: Appeals

Under a stipulation providing that the initial decision upon a contract appeal shall be limited to the issue of liability, it may be proper for questions of causation to be determined in the initial decision, and for the issue of the amount that should be allowed as an equitable adjustment, on the basis of such decision, to be remanded to the contracting officer.

Contracts: Changed Conditions

A contractor will be granted an equitable adjustment on account of a changed condition, notwithstanding his use of inappropriate construction procedures, to the extent to which the costs of the job would have been augmented by the changed condition even if appropriate procedures had been used.

BOARD OF CONTRACT APPEALS

The Board in its decision,¹ dated July 17, 1961, upon IBCA-223 and IBCA-229 sustained in part and denied in part the first of those appeals and sustained in its entirety the second. Motions for reconsideration of that decision, in so far as it pertains to IBCA-223, have been filed by the appellant and by the Government.

The appellant's motion for reconsideration presents three salient contentions, which will be considered in order.

First, appellant contends that the Board failed to give sufficient weight to the differences between the terms of the contract specifications and the terms of the specifications incorporated in an earlier invitation under which all bids were rejected as being too high. The

¹ 68 I.D. 201, 61-1 BCA par. 3082, 3 G.C. par. 505.

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differences to which appellant draws our attention have to do with the steel sheet piling.

The specifications of the earlier invitation required that such piling be driven, particularized the types and sizes of the individual piles, prescribed where they should be driven and how deep they should be driven, provided for the use of a minimum number of tiebacks to support the sheet piling against "external hydraulic pressure," and required that such piling be left in place when the job was completed. In contrast, the contract specifications, which are quoted in our decision, left all these matters to appellant's own judgment.

Appellant asserts that the changes in question were made because the Government intended to reduce costs, and that the bidders were informed of such purpose.² From these premises appellant draws the conclusion that a prudent bidder would not have anticipated the need for steel sheet piling, or for other relatively expensive construction procedures such as the site consolidation and deep wells mentioned in our decision.

The evidence reveals that after the bids under the earlier invitation had been opened representatives of the bidders orally stated to Government representatives that one reason why the bids were so high was because the specifications limited the sheet piling that could be used to particular types and sizes, and prohibited the removal of such piling when the job was finished. The evidence further reveals that these statements led the engineers who drafted the contract specifications to believe that competition in bidding could be best stimulated by omitting any hard-and-fast requirements with respect to sheet piling, and by leaving the successful bidder entirely free to employ any feasible method of dewatering and excavating that he might elect to use. It is, however, quite clear that these engineers did not believe the job could be done without using sheet piling unless some such alternative as site consolidation or deep wells were to be adopted, and did not expect bids to be submitted on the assumption that an open-pit method, with open pumping, would suffice. It is also clear that appellant, while aware of the differences between the two sets of specifications, had no knowledge of the reasons that motivated the engineers to put the use of sheet piling on an optional, instead of a mandatory basis, until long after the award of the contract.

²The sheet piling changes were by no means the only differences between the two sets of specifications. As pointed out in the portion of our decision that pertains to IBCA-229, some of the principal items of work included in the earlier invitation were excluded from the invitation for the present contract. These differences in the scope of the work were expressly mentioned in the contract specifications. It was thus evident from the face of the latter that the Government intended to reduce costs in ways that had no relationship to the sheet piling problem.

A comparison of the text of the contract specifications with the text of the specifications of the earlier invitation sheds no real light on the problem of whether the contract specifications should be interpreted as meaning that the job was physically capable of being performed by the open-pit method in the manner attempted by appellant. Hence, such comparison, although considered by the Board, was not expressly mentioned in our decision. The evidence described in the preceding paragraph does shed some light on that problem, but what it reveals is that the contract specifications were *not* intended by the Government engineers who drafted them to mean that the job was capable of being performed by the open-pit method in the manner attempted by appellant. We did not take this evidence into account in our decision because of the rule that understandings or thoughts of one party to a contract, of which the other party was reasonably unaware, cannot serve as a foundation for binding the latter to the meaning which the former placed on the words of the contract.³ If we were now to take into account this evidence, it would afford no basis for altering our decision, since its tenor is that the Government hoped to reduce costs by according the successful bidder latitude in selecting his dewatering and excavation methods, but did not intend to include in the contract any representation, warranty, or indication that the job was physically capable of being performed by any particular method or combination of methods.

Secondly, appellant contends that the Board erred in determining that the open pumping expenses were not caused by the changed condition found by the Board to have been encountered. This determination, appellant says, was made prematurely in view of the stipulation of the parties that the issue of liability, but not the issue of damages,⁴ should be determined at this time, and is, appellant also says, contrary to the evidence.

The stipulation in question was tentatively agreed upon at the pre-hearing conference, and was finally adopted at the conclusion of the taking of testimony. The record shows that what the parties had in mind when they entered into the stipulation was that the Board in its initial decision would determine all points in controversy except *the amount of the items of expense* for which an equitable adjustment should be made if such items were found to be attributable to a changed condition. The record further shows that the process of determining the amount of the items of expense was understood by

³ 3 *Corbin, Contracts*, sec. 538 (rev. ed. 1960); 3 *Williston, Contracts*, sec. 610 (rev. ed. 1936).

⁴ The Board has followed the practice of the parties in using the expression "issue of damages" as a synonym for the more accurate expression "issue of the amount of the equitable adjustment to be made."

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the parties as being primarily a matter of verifying the accuracy and propriety of the cost accounts and procedures by which appellant was seeking to prove such amount. Nowhere in the record is there any intimation that either party wanted or expected the Board to defer making a determination as to whether the items of expense for which appellant was claiming an equitable adjustment *were or were not caused* by the changed condition, if any, found by the Board to exist. On the contrary, both parties offered a great deal of testimony concerning the causal relationship between the underground conditions encountered by appellant and such items of expense, and, in particular, upon the relationship between the underground conditions and the open pumping expenses. While it is evident that the Government did not offer at the hearing all the evidence it desired to present on questions of amount, there is nothing in the record to support the suggestion that appellant did not offer all the evidence he desired to present on the questions of causation that were examined and determined in our decision. In short, the circumstances surrounding the stipulation all point to but one conclusion, namely, that both parties understood these questions of causation as being an integral part of the issue of liability, rather than of the issue of damages, when they entered into the stipulation.

With respect to the substantive problem of whether the open pumping expenses were in fact caused by the changed condition, we are convinced that the preponderance of the evidence is to the effect that they were not so caused. The reasons for this conclusion are fully explained in our decision.

Thirdly, appellant contends that the action of the Board in remanding the issue of damages to the contracting officer was inconsistent with the stipulation, and will bring about unnecessary delay in the final determination of that issue.

At the prehearing conference appellant initially took the position that he was prepared to prove his entire case at the hearing and wished the Board to dispose of the entire controversy in one decision. However, appellant necessarily receded from this position in agreeing to the stipulation, which not only deferred determination of the issue of damages, but also provided that before its determination the Government should have an opportunity to examine appellant's cost records and to take testimony by deposition on questions of amount. As the stipulation does not state, expressly or by necessary implication, that there is not to be a remand to the contracting officer, the making of a remand by the Board was not inconsistent with the stipulation. Conversely, as the stipulation does not state that there is to be a remand, the real problem posed is whether the remand ordered by the Board consti-

tutes an appropriate means of implementing either the provisions of the stipulation or the principles of sound procedure.

The issue of liability having now been determined, it may well be that, either before or after the examination of appellant's records and the taking of testimony by deposition, the parties will be able to agree upon the amount of the equitable adjustment to be paid with respect to some or all of the four items of expense as to which the Board has found such an adjustment to be due. To the extent that they do so, determination of the issue of damages by the Board will become unnecessary. To the extent that they fail to do so, it will be necessary for the scope of that issue to be definitely formulated by the parties before it will be ready to be passed upon by us. The way the case now stands the Board does not know how much money appellant considers is due him as an equitable adjustment for the particular portions which the Board has found to be allowable of these four items of expense, or how much money the Government is willing to concede is thus due. Implementation of the stipulation and sound procedure call for allowance of an opportunity to make an agreed settlement, and for requirement of a definite formulation of the scope of any remaining disagreement.

Doubtless there is more than one procedural device by which these objectives could be achieved. The experience of this and other Boards has been that a remand to the contracting officer is frequently an effective and expeditious method of coping with the issue of damages. The alternative suggested by appellant is that the Board retain jurisdiction of the case and set a time and place for taking depositions. This alternative not only overlooks the provision in the stipulation for an examination of appellant's records—a measure that conceivably could lead to a speedy arrival at an agreed settlement—but also fails to set up a mechanism for informing the Board of the respective positions of the parties with respect to the amount of the equitable adjustment to be allowed and of the reasons for those positions. Considering these deficiencies, we believe that the alternative would probably turn out to be a less effective and expeditious procedure for handling the issue of damages than would be the remand provided for in our decision. In the circumstances the Board considers that the remand was compatible with the stipulation, and is not persuaded that it will tend to be productive of unnecessary delay.

The Government's motion for reconsideration contends that the equitable adjustment to be made with respect to the well point systems should be limited to the costs of installation of those systems, and to such part of the costs of their operation as was incurred after appellant decided to resort to underwater construction procedures. The

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Government argues that well point operation costs incurred before the latter date were brought about by appellant's inept choice of methods for dealing with the dewatering problem, and in support of this argument points to the Board's findings that the underwater operations should have been planned for from the beginning, and should have been started at about the same time that the cofferdam was completed.

The net effect of an acceptance of the Government's position would be to disallow any equitable adjustment for dewatering costs incurred during the months while appellant was attempting to perform the job in the dry. Yet it is clear from the evidence that the changed condition was operative during those months, and was a factor in increasing the dewatering costs above the level that would otherwise have had to be incurred during the same period, even if underwater operations had been timely initiated. In arriving at its decision the Board considered the position now advocated by the Government, but concluded that it was an untenable one, saying:

It is, in our opinion, a sound inference from the evidence as a whole that the excessive hydrostatic pressure would have made it necessary for appellant either to use well points or to adopt some alternative method of intercepting water flows in the formations below the stiff clay, and possibly also in the sand stratum, *even if he had planned from the beginning on a cofferdam and underwater operations*, and had driven the sheet piling into the stiff clay. (Italics supplied.)⁵

After again reviewing the evidence, we believe that the quoted finding was correct, and we hold that the costs incurred for well point operations before appellant decided to resort to underwater construction procedures are properly includable in the measure of the equitable adjustment to be allowed, on the same basis as costs incurred for well point operations after that date.

Conclusion

The motions for reconsideration filed by the appellant and by the Government with respect to IBCA-223 are respectively denied.

HERBERT J. SLAUGHTER, *Deputy Chairman.*

We concur:

PAUL H. GANTT, *Chairman.*

THOMAS M. DURSTON, *Member.*

⁵ 68 I.D. at 227.

APPEAL OF HENLY CONSTRUCTION COMPANY

IBCA-249

*Decided December 7, 1961***Contracts: Changes and Extras—Contracts: Contracting Officer—Contracts: Additional Compensation**

A constructive change order arises where directions are given by the contracting officer to perform the work by methods not required by the contract. It entitles the contractor to an equitable adjustment.

Contracts: Changes and Extras—Contracts: Additional Compensation

Where the equitable adjustment to which the contractor is entitled under the Changes clause is not capable of determination by precise mathematical means, the Board will resolve conflicting evidence to determine the reasonable amount of such adjustment.

Rules of Practice: Appeals: Generally

Where a party fails to make a timely request for reconsideration of the adverse portion of a decision of the Board, the matter so decided may not again be considered in a subsequent appeal based on other claims.

BOARD OF CONTRACT APPEALS

This timely appeal involves a dispute as to the adequacy of additional compensation computed by the contracting officer pursuant to the decision of the Board in the *Appeal of Henly Construction Company*, IBCA-185 (February 23, 1960), 67 I.D. 44. That decision held, in essence, that the Government had changed the method of construction of about 40 miles of lateral irrigation ditches and wasteways, from the method originally planned by appellant, to the so-called econ-grade method (with which appellant was not familiar), and that appellant was thereby entitled to additional compensation.

Briefly, the econ-grade method is as follows:

Material excavated from higher ground, where cuts were made for the ditches, was hauled ahead or back to provide fill for lower grades. The quantities so moved (together with material from borrow when required) were so computed and determined that the material re-excavated from the fills to make the ditches would be just enough to raise the banks on either side to the required finished grades. This, in theory at least, resulted in a minimum use of fill material, as contrasted with an obviously wasteful method of first constructing the entire fill to the required finished grades for the side banks and then wasting or casting aside the re-excavated material in digging the required canal prism in the fill areas.

The appellant had planned to use a modification of the econ-grade method, by the use of which, it was estimated by Mr. Henly, Sr., during the hearing of the first appeal, only about 5 percent of the material

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placed in fill areas would have to be re-excavated or rehandled.¹ This method will be more fully described *infra*.

Because of the generally flat terrain of the region, there were comparatively few areas where deep or thorough cuts were required, and consequently the amount of excavated material available for adjacent fills was not excessive. In some cases the excavated material was not suitable, or the length of haul was uneconomical for the Government. Under the econ-grade method, in order to reduce the necessity for borrowing material outside of the banks (which would add to the Government's costs), the cuts and fills had to be nicely balanced. Also, under the econ-grade method, the grades of the fills were required to be precisely constructed to a tolerance of one-tenth of a foot, so as to provide exactly the amount of material re-excavated from the prism as would be necessary to raise the banks to their specified completed heights or finished grades.

About 2 months after the appellant had commenced construction with use of the econ-grade method, he was advised by Mr. Boston, the Government Construction Engineer, that the Government did not intend to pay for the material re-excavated from fills, above natural ground level. The Government would pay the contract unit price of \$0.40 per cubic yard, but only for the original excavation from cuts (below natural ground level) or borrow pits. This price included the cost of placing the excavated material in fill embankments, and the Government apparently considered that it should not pay twice for such excavation. The Board determined that the re-excavation from fills should be paid for by the Government. Appellant had conceded at the hearing that it would have been obliged to re-excavate about 5 percent of the fill if it had used its chosen method. The contracting officer found that appellant had re-excavated a total of 10,458.3 cubic yards, and reduced this quantity by 5 percent to a net figure of 9,935.4 cubic yards.

Moreover, the Government refused to pay for material borrowed by the contractor from outside the embankments for temporary use in completing the banks of the laterals in certain areas. It was claimed by the Government that in the re-excavating work the appellant's tractors and scrapers were too wide to completely excavate the narrow bottoms of the ditches, so there was not enough re-excavated material for the purpose of completing the embankments. Hence, the material temporarily borrowed was used for that purpose. When the remaining material in the bottoms of the laterals was finally excavated with back-hoes or draglines, the material so excavated was used to replace the material which had been temporarily borrowed. Mr. Henly testi-

¹ Tr. 69.

fied that he was able to get to the bottom of the ditches with his equipment, but had borrowed the material from outside the embankment because he understood the Government preferred that material as being better quality for the embankments than the material in the ditch bottoms. This testimony was not rebutted by the Government. The Board held that the appellant was entitled to be compensated at the contract unit price of \$0.40 per cubic yard for such borrowed material.

The appeal was remanded to the contracting officer who was "directed to proceed as outlined in the last paragraph of the discussion of Claims Nos. 1 and 2" of the opinion. The classification claims, for additional quantities of intermediate and rock excavation, were denied. The last paragraph of the discussion of Claims Nos. 1 and 2 reads as follows:

The Board must hold that the appellant is entitled to additional compensation under Claims Nos. 1 and 2. The parties agreed at the hearing that the contracting officer should make findings with respect to the quantities on the basis of which the additional compensation would be determined if the appellant prevailed, and he is directed to make such findings. In arriving at the quantity of rehandled material involved in Claim No. 1, he may deduct, however, the 5 percent which in any event would have been rehandled under the appellant's chosen method of operation. Since it is apparent that it is easier to rehandle material that has once been excavated,² the contracting officer need not be bound by the unit prices for excavation provided in the schedule, and may fix a lesser price in determining the amount of additional compensation under Claim No. 1. If the appellant is dissatisfied with the contracting officer's determinations, it may appeal again to the Board pursuant to the "disputes" clause of the contract.

The appellant did not request reconsideration of the Board's decision as to the classification claims within the prescribed 30 days following the date of the decision.³ Hence, those claims denied by the Board for reclassification of excavated material, although reasserted in appellant's briefs in the instant appeal, may not again be considered by the Board.⁴

In his Supplemental Findings of Fact and Decision dated May 26, 1960, the contracting officer found that, as to Claim No. 1, appellant had re-excavated or rehandled 10,458.3 cubic yards (or 9,935.4 c.y. net, deducting 5 percent from the fill portions of the econ-grade embankment in completing the lateral and wasteway prisms. This amount was calculated from information contained in the Cross-Section Books, but of course does not include the quantities of excavation below

² In Paragraph 14 of the Findings, the contracting officer commented on the ease with which the material could be re-excavated.

³ 43 CFR 4.15.

⁴ Cf. *Henly Construction Company*, IBCA-165 (March 1, 1960), 60-1 BCA par. 2538, 2 Gov. Contr. par. 185; *Carson Construction Company*, IBCA Nos. 21, 25, 28, 34 (May 20, 1959), 66 I.D. 177, 59-1 BCA par. 2222, 1 Gov. Contr. par. 396; *Tankersley Construction Company*, ASBCA No. 5633 (September 28, 1960), 60-2 BCA par. 2763.

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original ground level in thorough or partial cuts (or partial fills), for which payment was previously made under the contract. At \$0.40 the net yardage produces \$3,974.16.

As to Claim No. 2, for material temporarily borrowed from shoulders outside the embankments, the contracting officer found that 2,691.6 cubic yards of material were so borrowed. This finding was based on analysis of the work and visual examination of the locations where material was borrowed and later repaid by refill from the final excavation of the prisms.

In each instance the findings of the contracting officer are detailed in Exhibits 1 and 2, respectively, attached to the findings, designating the lateral or wasteway involved and the amounts of excavation between stations.

Appellant has attacked both of these findings as being erroneous and inadequate. Additionally, appellant claims that the total excavation paid for under the contract was grossly understated by 122,567 cubic yards. This claim is derived from a summary statement dated October 26, 1960, submitted by appellant's consulting engineers, Wilberding Company, Inc., of Washington, D.C. It is also claimed by appellant, after considerable study of the Government's records, that those records are not complete and are valueless for the purpose of determining the additional amounts of excavation for which appellant is entitled to be paid. Therefore, as an alternative method, appellant has submitted a statement of its costs of performance of the entire contract and asks that it be paid for its alleged losses, in excess of the amount paid by the Government. These losses are stated to be \$88,433.53, and are alleged to have been caused solely by the Government's instructions as to construction of the econ-grade.

On December 7 and 8, 1960, a conference was held in the offices of the Board for the purpose of determining whether it was possible to reach an agreement between the parties or, in the alternative, to narrow the issues and to determine the necessity for and the type of further proceedings in this appeal. No settlement was reached.

A pending motion by Department Counsel for dismissal of the appeal was denied and the Government was required to furnish additional data for the appeal file concerning the findings of fact and decision of May 29, 1960. These data were furnished and were examined by appellant's counsel, appellant's consulting engineer, and by Mr. Henley, Sr., on various occasions in January and February 1961.

It was also determined that a hearing would be scheduled by the Board at the convenience of appellant. However, in a letter of April 21, 1961, appellant's counsel notified the Board that such a hearing would not be feasible, because of the expense to appellant, and the

unavailability of Mr. Henly, who was obliged to return to a job at a distant point. In lieu of a hearing, appellant submitted a volume marked "Exhibit 1," and entitled "Facts and Correspondence in connection with U.S. Bureau of Reclamation Specifications DC-4758 and claim of Henly Construction Company, Inc." Within this "Exhibit 1" are included Lists of Facts and Correspondence, identifying some 78 further exhibits beginning with another "Exhibit 1." This list also contained explanatory remarks, quotations from exhibits and argument, and is signed for the appellant by Mrs. Lillian S. Henly and concurred in by George B. Henly, Sr., President.

With a few exceptions, the material thus submitted is already contained in the appeal file. In order to avoid confusion in identification of exhibits within the "Exhibit 1," they will be henceforth referred to as "Attachment No. 16 to appellant's Exhibit 1 of April 17, 1961."

Taking up appellant's claims in the same order as they were presented, we find that as to Claim No. 1, for re-excavation of the fill areas, there is logical support for the determinations by the contracting officer as to the quantities of excavation re-excavated or rehandled from the fill portions of the econ-grade. It is fairly well established that the entire amount of fill dirt placed in the areas of shortages was about 75,500 cubic yards. This was established by the haul sheets, which were the detailed instructions for moving dirt ahead or back, from excavation below natural ground or from borrow pits, into the low or shortage areas, in order to build the econ-grade embankments. These haul sheets were Government records, but were used by appellant's representatives in compiling a list of the shortage areas and cubic yards of shortages between stations.⁵

That list was attached to appellant's letter of February 7, 1958, to the Government, and the total of 75,500 cubic yards was referred to in that letter as being material obtained *exclusively* from borrow.⁶ This was, of course, an unfortunate misapprehension on the part of appellant, and it has produced considerable confusion as to Claim No. 2. Actually only about 25,520 cubic yards of the 75,500 total were obtained from borrow, unless we add to that figure the amount of 2,691.6 cubic yards found by the contracting officer to have been borrowed temporarily from shoulders under Claim No. 2 as described *supra*, and which may not have been included in the computation of 75,500 cubic yards because it was not authorized originally as borrow.

⁵ The Summary Statement dated October 26, 1960, prepared by appellant's consulting engineers (*supra*), indicates "Total excavation taken from Mass Diagrams for Econ-Grade * * * 148,088 C.Y." This quantity, if it purports to represent the fill material placed in the econ-grade, is neither supported by, nor reconciled with the haul sheets.

⁶ Exhibit No. 18 attached to Contracting Officer's Findings of Fact and Decision dated October 7, 1958.

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Appellant claimed in its letter and claim of June 18, 1958,⁷ that a total of 132,848 cubic yards was excavated from the econ-grade, including material excavated below natural ground in partial fill areas. It had employed a subcontractor from September 15 to November 2, 1958, to excavate a large part of the econ-grade. In order to determine the total yardage for which appellant would be required to pay the subcontractor, appellant requested and obtained from the Government a figure of 21,686 cubic yards as representing the total excavation, including fills and natural ground below partial fills, performed by the subcontractor.⁸ This was all common excavation. Appellant complained that it was paid for only 16,883 cubic yards of common excavation during this period, this being, apparently, excavation below natural ground under partial fills. Accordingly, appellant concluded that the difference between 132,848 cubic yards and 16,883 cubic yards, or 115,965 cubic yards, was the amount excavated from the fill portions, for which it was not paid. This argument uses two erroneous assumptions. First, the figure of 132,848 cubic yards appears to have been based on an estimate or calculation of the total cubic contents of the lateral and wasteway prisms, obtained from or related to a rule of thumb that there was an average of about one-half cubic yard of content for each linear foot of laterals.⁹ However, in the entire total of nearly 40 miles of laterals and wasteways, including thorough cuts where there was no fill, there would be about 211,200 linear feet. At one-half cubic yard per linear foot this produces a result of 105,600 cubic yards of cubic contents of all laterals for the entire job.

Secondly, of course, 132,848 cubic yards could not possibly have been excavated from fill areas containing a total of only 75,500 cubic yards.

Nevertheless, it is of some interest that appellant was obliged to pay its subcontractor for 21,686 cubic yards while receiving payment from the Government for only 16,883 cubic yards, the later figure apparently being for the same work. If this is so, then the subcontractor must have excavated from fill areas a total of 4,803 cubic yards. Appellant had an agreement with the subcontractor K & P Co. "that they would dig *common excavation* and we would dig the *rock* and *intermediate* excavation."¹⁰ For rock and intermediate excavation in laterals from August 1957 to the end of the contract, appellant was paid on the basis of 4,132 cubic yards of rock and

⁷ P. 24 of Exhibit No. 16 to Contracting Officer's Findings of Fact and Decision of October 7, 1958.

⁸ Attachment No. 16 to appellant's Exhibit 1 dated April 17, 1961.

⁹ Fn. 7 *supra*.

¹⁰ P. 12 of Exhibit No. 16 to Contracting Officer's Findings of Fact and Decision of October 7, 1958.

9,463 cubic yards of intermediate excavation. Naturally this represented no fill excavation as such, but a large part of it must have been in natural ground beneath partial fills, for the contracting officer's findings of 10,458.3 cubic yards of excavation from fill would mean that 5,655.3 cubic yards were excavated from fill in addition to the 4,803 cubic yards attributed to the subcontractor. These figures seem to the Board to be entirely consistent. Certainly there are no discrepancies or errors on the face of the contracting officer's findings, and the appellant has not convinced the Board of any such discrepancies or errors. Also, considering that the total quantity of fill embankment was about 75,500 cubic yards and that one side of the embankment provided a roadway of 10 to 12 feet in width, the contracting officer's calculations that 10,458.3 cubic yards of fill were re-excavated and rehandled from 75,500 cubic yards are quite reasonable and logical. This figure (10,458.3 c.y.) does not represent the entire cubic capacity of the laterals and wasteways in fill areas. Many of these areas were partial fills, and appellant was paid for a total of 30,478 cubic feet of excavation of all types below natural ground while excavating the completed econ-grade.

From appellant's arguments and its protests as to insufficient pay quantities during performance of the contract, we gain the impression that appellant considered it was excavating much more than it was being paid for, at nearly all stages of the contract.¹¹ This was without doubt true to a certain (but unknown) extent, because the pay quantities were limited to the cubic contents within the neat lines of the prisms or cross sections. But appellant was aware, as its superintendent Mr. Lzicar testified on cross-examination at the hearing of the first appeal, that there was necessarily a good deal of over-excavation, beyond the neat lines, in order to be sure to get the canals deep enough. This is expected and is a common practice; appellant bid on the basis that it would not be paid for overexcavation.¹²

Accordingly, the Board finds that appellant has not sustained its burden of proof with respect to its allegations of error and insufficiency of the additional quantity of excavation allowed by the contracting officer under Claim No. 1.¹³ The contracting officer's findings

¹¹ Mr. Henly testified at Tr. 17-18 that " * * * we were being paid in full for building, for handling the dirt as we went along except—well we were substantially being paid, we might have had some beef but that was as to classification; but substantially as to quantity, we were being paid. * * * "

¹² Tr. 97.

¹³ "The burden of this appeal is on the contractor's shoulders, and that burden calls for evidence on the contractor's side to show that the action taken by the contracting officer was erroneous; and it is not sufficient merely for the contractor to say that the action was not proper, for such a contention should be supported by proof giving some explanation of just why it was an error. In the absence of such proof the Board must accept the record, together with any testimony submitted by the Government, as being

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with respect to the additional quantity of 10,458.3 cubic yards are affirmed.

The prior decision of the Board held that appellant was entitled to additional compensation as to Claim No. 1, as a result of the instructions of the Government to the appellant to use the econ-grade method of construction instead of the method planned by appellant. Since these instructions amounted to a constructive change order, the appellant was entitled to an equitable adjustment under the Changes Clause. Such an adjustment was not necessarily limited to the quantities re-excavated from fill embankments in completing the excavation of the laterals and wasteways, and the Board's decision contained no such limitation. The additional cost of performing the work as changed, in excess of what the work would have cost under the method originally planned, plus a reasonable profit, would be the proper measure of the equitable adjustment or additional compensation. The quantity of material re-excavated or rehandled from fill, for which appellant originally had been denied payment, was merely one aspect of the entitlement of appellant to additional compensation.

There was considerable testimony at the hearing, on the part of appellant, that the contract cost more to perform under the econ-grade method than it would have cost under the method originally planned by appellant.¹⁴ The contracting officer gave partial recognition to, and made an allowance for such additional costs in his Supplemental Findings of Fact and Decision dated May 26, 1960, when he stated in paragraph 2 thereof:

* * * Inasmuch as all of this excavation is comparatively easy digging, the Board of Contract Appeals stated in its decision that the contracting officer need not be bound by the bid price in determining the unit price to be paid for the rehandling but might find that a price lower than the bid price as claimed by the contractor constituted the reasonable cost of the excavation. It is my conclusion that the easier digging was about equal to the *minor amount of additional cost involved in finishing required in constructing the "econ-grade" in fill sections*, and I therefore find that the reasonable value of the rehandling of the material to construct the lateral prism in the "econ-grade" fills is the amount claimed by the contractor, 40 cents per cubic yard. * * * (Italics supplied.)

Moreover, the Board has held that it is not necessarily precluded from deciding a claim upon a theory not advanced by the parties.¹⁵

correct, unless it, on its face, shows error or that it is unbelievable." *Duncan Construction Company*, IBCA-91 (April 2, 1958), 65 I.D. 135, 138, 58-1 BCA par. 1675. See also *Weidfab, Incorporated*, IBCA-268 (August 11, 1961), 68 I.D. 241, 61-2 BCA par. 3121, 3 Gov. Contr. par. 500, and cases cited therein.

¹⁴ Tr. 60-68.

¹⁵ *Paul C. Helmick Company*, IBCA-39 (October 31, 1956), 63 I.D. 363, 365-66, 56-2 BCA par. 1096, quoting from *John A. Johnson Contracting Corp. v. United States*, 132 Ct. Cl. 645, 656 (1955): "The plaintiff's failure to analyze with greater nicety the appropriate theory for its claim should not have the effect of a forfeiture of its rights."

In *Ray Kizer*,¹⁶ the Board said:

Within the factual scope of an appeal, the Board is not limited either by the appellant's own choice of remedy nor by the Government's assignment of defense.

The appellant, in its claim attached to its letter of June 18, 1958,¹⁷ alleged a loss on this contract of \$100,000, represented by debts, plus other costs or damages aggregating \$41,900. However, very little evidence was presented as to the cost of performing the work as changed, as compared with the cost of performing the contract in the manner first contemplated by the appellant. That method included building the roadway to its final height, while a lower level of fill was established at the ditch side of the road. That side of the roadway embankment would thus provide one of the finished banks of the lateral without much refinement. Appellant would then excavate from the lower level of fill enough dirt to provide for the smaller bank on the side opposite the road. Mr. Henly, Sr., testified that this amount of excavation "might possibly run into rehandling expense there on the fills only of say, 5 percent."¹⁸

Mr. Henly, Sr., also testified¹⁹ that under the econ-grade method, all of the fill embankment had to be completed prior to starting on the re-excavating work, while under his method the latter process was performed immediately following the grading operation. It is not clear why this should be so. In any event, it seems to us, there was no reason why appellant's dragline or similar equipment could not have followed along at some distance behind the completion of the econ-grade and so perform an earlier re-excavation of the fill. There does not appear to have been any evidence of a prohibition of such a method, on the part of the Government. Perhaps the delay in re-excavation was due to a disinclination, on the part of the appellant as well as the Government, to split their respective employees in such a manner.

In response to an inquiry by appellant as to the exact quantity of material placed in the econ-grade, the Government's letter of August 14, 1958, stated that the exact amount was 75,417 cubic yards (rather than 75,500, as totaled in appellant's letter of February 7, 1958). Hence, the 10,458.3 cubic yards of re-excavation allowed by the contracting officer represents 13.8 percent of the fill embankment, as compared with 5 percent stated by Mr. Henly to be necessary rehandling under his own method. This difference does not of itself give rise to additional costs, since appellant would now be paid for the additional quantity so re-excavated.

¹⁶ IBCA-274 (September 15, 1961), 61-2 BCA par. 3128, 3 Gov. Contr. par. 509(b).

¹⁷ P. 29 of Exhibit 16 of Contracting Officer's Findings of Fact and Decision of October 7, 1958.

¹⁸ Tr. 69.

¹⁹ Tr. 67, 68.

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It is illustrative, however, of the additional time and care required in finishing the job. Instead of making only one pass in the fill to construct the small bank opposite the road on an approximation or sight basis (without survey stakes), to its completed height,²⁰ appellant was required to construct that bank to a finished grade with precision survey measurements of $\frac{1}{10}$ -inch tolerance. In addition, the roadway bank had to be brought up to the same precise measurements using material from the same excavation, so that it was necessary to divide accurately the re-excavated material between the two banks. This, we feel, was a much more meticulous process than appellant's original plan, and we conclude that it required at least 50 percent more time. Appellant has claimed that the entire job took about twice as long as had been anticipated, although it was completed within the time required by the contract. The gulf between hopeful expectation and fulfillment is often very wide, and appellant was probably too optimistic.

The previous decision permitted the contracting officer to determine additional compensation for the work of re-excavation at a rate less than the unit price of \$0.40 per cubic yard specified by the contract, in view of the ease of re-excavation.²¹ Such a view would be logical for areas in thorough fill, but it appears to us now to have been inequitable in view of the other factors involved, which were not considered in the Board's previous decision, i.e., most of the econ-grade was in partial fill requiring considerable excavation below original ground level, including intermediate and rock excavation underneath the fill embankment or econ-grade. Where it was necessary to excavate also such materials underlying partial fills, those materials would be controlling as to the degree of ease of excavation, it appears to the Board.

Accordingly, we hold that there should be no reduction in the unit price of \$0.40 for re-excavating the fill sections of the econ-grade.

We come now to the question as to what additional compensation should be fixed as part of the equitable adjustment to which appellant may be entitled under Clause 3, Changes, of the contract. Admittedly, there is a scarcity of satisfactory evidence for that purpose. The contracting officer has characterized the additional cost as follows, in paragraph 2 of his Supplemental Findings of Fact and Decision dated May 26, 1960:

* * * It is my conclusion that the easier digging was about equal in value to the minor amount of additional cost involved in finishing required in constructing the "econ-grade" in fill sections * * *.

²⁰ Tr. 74.

²¹ Fn. 2.

After reviewing and considering the entire record over a considerable period of time, the Board has concluded that the additional cost to appellant in the excavating for and in the work of constructing the econ-grade as well as the re-excavation of fill sections was not a minor amount. Appellant's workmen had to be instructed by Government officials in the complicated methods of calculating the "hold-ups" on cuts and the "hold-downs" on fill sections. Sometimes the stakes were set by Government inspectors and on other occasions by appellant's workmen. In some cases Government officials checked stakes set by the contractor. The overall situation made for confusion as to responsibility and for substantial delay in the conduct of the work. Unfortunately, appellant's cost records were not maintained on a basis of contract item costs but were on a month-to-month basis for the entire contract. However, appellant has computed that its weighted bid for all excavation was 47½ cents per cubic yard. Based on total excavation of 280,418 cubic yards of actual excavation, the contractor's alleged costs come to 78½ cents per cubic yard. Needless to say, it is not possible to rule out other factors as causes of the appellant's extremely high costs for this contract. Nevertheless, there is no indication that any significantly great amount of inefficiency existed other than that generated by the unfamiliarity of the appellant and his workmen with the methods of complying with the changes ordered by the Government. Nor is there any catastrophe to which we can point as contributing to such excessively high costs, outside of the breakdown of the dragline for nearly the entire month of July 1957. During this period the appellant concentrated on excavation for structures in order to partially offset the equipment delay in re-excavation of the econ-grade. Appellant's bid was not unduly low, in comparison with others.²²

However, in adopting the "jury verdict" approach²³ to an equitable adjustment, in view of the meager extent of the more satisfactory evidence it is necessary to take a conservative position concerning appellant's alleged increase in costs. Accordingly, in attempting to assess the additional compensation due appellant for additional costs of excavating material from cuts we find no evidence concerning the quantities of excavation involved, except for excavation from the shoulders outside of the lateral prism, which will be considered in

²² Appellant's total bid was \$11,105.30 under the next low bidder and \$30,703.00 under the Engineer's estimate. Appellant bid \$0.40 per cubic yard for excavation, common, for laterals and wasteways; two others bid \$0.37 and \$0.30.

²³ *Western Contracting Corporation v. United States*, 144 Ct. Cl. No. 344-55 (December 3, 1958); *Flora Construction Company*, IBCA-180 (June 30, 1961), 61-1 BCA par. 3081; *Caribbean Construction Corporation*, IBCA-90 (Supp.) (September 22, 1959), 66 I.D. 334-38, 59-2 BCA par. 2322, 1 Gov. Contr. par. 666. See also *Fred E. Hicks Construction Company*, IBCA-271 (October 20, 1961); *Lake Union Drydock Company*, ASBCA No. 3073 (June 8, 1959), 59-1 BCA par. 2229.

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Claim No. 2. Other than that, there were apparently no records of such quantities, and it is not possible to arrive at any adjustment therefor. Likewise, as to the work of excavation from thorough cuts or from borrow, we find that there is no evidence that the changes involved in the econ-grade method added measurably to the costs of such excavation.

After thoroughly weighing all of the facts brought to our attention, and resolving the conflicting evidence as best we can, the Board has arrived at the conclusion that appellant is entitled to be paid as additional compensation for constructing the econ-grade in accordance with the changes ordered by the Government, the added price of \$0.15 per cubic yard for 75,417 cubic yards placed in the econ-grade fill sections, or \$11,312.55.

In our evaluation of the amount due appellant in the equitable adjustment of its additional costs of constructing the lateral prisms in the econ-grade fill sections, we are guided by the same considerations discussed *supra* with respect to the construction of the econ-grade itself. In addition, we have weighed and appraised the factors of difficulty and delay caused by the necessity of finishing both embankments from re-excavated material, under the Government econ-grade method, discussed previously, as opposed to the contractor's plan which necessitated finishing only the small bank opposite the roadway. In addition to the unit price expressed in the contract, \$0.40 per cubic yard, the Board finds that appellant is entitled to the sum of \$0.20 per cubic yard for the net amount of material excavated from fill sections, after deduction of the 5 percent conceded by appellant to have been necessary under its own method of construction.

The Board finds, however, that the contracting officer misinterpreted the prior decision of the Board as to the deduction of 5 percent for material which appellant would have been obliged to re-excavate in any event under his own method of construction. We believe that the meaning of Mr. Henly, Sr.'s, testimony was that he would have necessarily excavated 5 percent of the fill section under his method, not 5 percent of what he excavated by use of the Government's method. Recomputing the quantities accordingly, the deduction amounts to 3,770.85 cubic yards, and deducting this quantity from 10,458.3 cubic yards total excavation from fill sections results in a net quantity allowable of 6,687.45 cubic yards rather than the net yardage of 9,935.4 as adjusted by the contracting officer. At the revised price of \$0.60 per cubic yard, the equitable adjustment amounts to \$4,012.47.

CLAIM NO. 2

As described earlier, this claim was for borrow material alleged by the contractor to have been not paid for by the Government. The

claim as described in appellant's letter of February 7, 1957, was based on a compilation of shortage area quantities as shown by the haul sheets and detailed in a list prepared by the appellant and appended to that letter. The total was 75,500 cubic yards (later determined by the Government to be 75,417 cubic yards, in response to appellant's request for the exact quantity of material placed in the econ-grade fill embankments). Of this amount, appellant acknowledged payment of 25,520 cubic yards, claiming nonpayment as to the balance of 49,980 cubic yards at \$0.40, or \$19,992.00.

As stated earlier in this opinion, appellant's superintendent, in establishing this claim, mistakenly assumed that the haul sheets represented only borrow material, whereas they actually included material excavated from cuts as well as borrow; in brief, the haul sheets represented all of the quantities of material of whatever source, required to construct fill embankments in the shortage areas.

Despite the clarification or explanation furnished by the Government, appellant has continued to contend that the 49,980 cubic yards represents borrow obtained from the shoulders of cut areas and used in fill areas.

The Government insists that its records show that only about 25,520 cubic yards is actually borrow material (fully paid for) and that of that quantity a small portion represents material excavated (and paid for as borrow) from shoulders where stakes were set back in order to permit appellant to borrow in cut areas, in instances where the material, not then fully excavated from the bottoms of the laterals, was caliche or material unsuitable for fills. The remainder of the material obtained in this manner, as computed by the Government pursuant to the Board's prior decision, amounts to 2,691.6 cubic yards. At \$0.40 this results in an award of \$1,076.64.

The Government's figures were apparently calculated with care and in good faith, and are supported by details in Exhibit 2 of the Contracting Officer's Supplemental Findings of Fact and Decision dated May 26, 1960. We find no fault with the quantities thus determined.

On the other hand, appellant has not proffered any evidence tending to combat the findings of the contracting officer. For the reasons stated hereinbefore concerning the quantities involved in Claim No. 1,²⁴ the Board affirms the contracting officer's findings as to the quantity of 2,691.6 cubic yards for which appellant is entitled to payment under Claim No. 2.

We also find, however, on the basis of our discussion of increased compensation for excavation²⁵ that appellant is entitled to be paid

²⁴ Fn. 13 *supra*.

²⁵ Fn. 22, 23 *supra*.

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for that quantity at a revised unit price of \$0.55 per cubic yard. This produces a total of \$1,480.38 in equitable adjustment, an increase of \$403.74 over the contracting officer's adjustment of \$1,076.74.

CLAIM NO. 3

This claim, for underpayment by 122,567 cubic yards, as stated in the Summary Statement dated October 26, 1960, is based on adding together the total quantities shown on the Mass Diagrams, or 148,088 cubic yards as computed by appellant's consulting engineer, with the total excavation quantities taken from the Cross Section Books for all of the laterals and wasteways, or 254,897 cubic yards, making a total of 402,985 cubic yards. Total payments made to appellant were based on total excavation of 280,418 cubic yards. The difference is 122,567 cubic yards.

This claim is easily disposed of for the reason that the entire possible yardage of excavation from laterals and wasteways is limited to the quantities derived from the Cross Section Books. The Mass Diagrams do not purport to show anything more than the movement of a portion of the total excavated material. To put it succinctly, the Mass Diagram quantities are included within the Cross Section Book quantities.

Accordingly, the claim is hereby denied.

CLAIM NO. 4

Concerning this claim, in substance, the appellant's brief proposes that because the Government's records and computations are incomplete and inadequate, the Board should either accept the appellant's figures as claimed, or allow the appellant to recover its entire alleged loss of \$88,433.53, as described in the brief attached to a letter dated April 21, 1961, with its attached Exhibits 2 and 3 (Schedule of Equipment Used; and Estimated Cost—Items 1, 2, 3, 4, and 5, respectively). Exhibit 3 is apparently a consolidated statement of costs "Prepared without audit or verification" according to the legend in the heading. This was so prepared, apparently, because appellant's records were not completely available to the accountant who prepared Exhibit 3. For the purpose of this opinion, however, we will accept it for what it may be worth.

The position now taken by appellant with respect to its appeal, that the Government's records and computations are of no value, cannot be adopted by the Board. We have held many times that such bare allegations do not constitute proof.²⁶ Nor has the appellant shown that

²⁶ *Fn. 13 supra.*

its total increased costs of performance were due entirely to the changes in the method of constructing the econ-grade and the laterals and wasteways. Other factors were most certainly involved. Appellant's claim dated June 18, 1958, states that its 11½-yard dragline was moved to the job in July 1957, but broke down immediately and needed extensive repairs, so that the re-excavation work did not get underway until August 1957.²⁷

In September 1957, apparently to offset this delay, appellant engaged a subcontractor to perform part of the work of re-excavating the econ-grade embankments. Thus, the appellant's overall cost figures undoubtedly reflect elements not identified with the additional costs of complying with the changes in method of construction. This makes such total cost figures too unreliable for our present purposes.²⁸

To the extent that we consider the appellant to be entitled to an equitable adjustment for the changes in method of construction of the laterals and wasteways under the contract, we have already appraised the additional compensation due, under Claims No. 1 and 2. Claim No. 4 embraces those earlier claims and takes in as well a much broader field, of a speculative nature. Therefore, Claim No. 4 is denied.

Conclusion

1. The appeal as to Claim No. 1 is denied as to the quantities involved, but is sustained as to the monetary adjustment therefor, as described in our discussion thereof, in the additional amount of \$11,350.86, or a new total of \$15,325.02.

2. The appeal as to Claim No. 2 is denied as to the quantities appealed from, but is sustained as to the monetary adjustment therefor, in the additional amount of \$403.74, or a new total of \$1,480.38.

3. Claims No. 3 and 4 are denied in their entirety.

THOMAS M. DURSTON, *Member*.

I concur:

JOHN J. HYNES, *Member*.

HERBERT J. SLAUGHTER, *Member*, absent on leave.

²⁷ PP. 9-11 of Exhibit 16 attached to Contracting Officer's Findings of Fact and Decision dated October 7, 1958.

²⁸ *F. H. McGraw and Company v. United States*, 131 Ct. Cl. 501, 511 (1955). "This method of proving damage is by no means satisfactory, because, among other things, it assumes plaintiff's costs were reasonable and that plaintiff was not responsible for any increases in cost, and because it assumes plaintiff's bid was accurately computed, which is not always the case, by any means." See also *Spencer Explosives, Inc.*, ASBCA No. 4800 (August 26, 1960), 60-2 BCA par. 2795, 2 Gov. Contr. par. 520; *Holly Corporation*, ASBCA No. 3626 (June 30, 1960), 60-2 BCA par. 2685, 2 Gov. Contr. par. 417; *H. R. Henderson & Co., and A & H., Inc.*, ASBCA No. 5146 (June 9, 1960), 60-1 BCA par. 2662; *Air-A-Plane Corporation*, ASBCA No. 3842 (February 29, 1960).

*November 9, 1961***APPEAL OF MERRITT-CHAPMAN & SCOTT CORPORATION****IBCA-240***Decided November 9, 1961****Contracts: Payments—Labor: Wage Rates—Rules of Practice: Appeals: Generally**

Where a request for reconsideration of a decision of the Board is not persuasive of error by the Board, the decision will be affirmed. Where the Board finds on reconsideration that its prior decision was in error as to the amounts equitably payable under a labor escalation clause, the Board will modify its decision accordingly.

BOARD OF CONTRACT APPEALS

The Government has requested reconsideration of the Board's decision of January 4, 1961. That decision sustained the contractor's appeal from findings of fact which determined that increased wage rates for electricians and basic craft workers are not eligible for escalation under the contract. The Board has reconsidered its decision, paying particular attention to the arguments advanced in briefs filed by the parties relating to the motion for reconsideration. The principal opinion stated the essential facts of the dispute, and no attempt will be made in this opinion to restate them completely.

The Government argues that the Board erred in interpreting the escalation clause contained in Paragraph 19 of the specifications. This clause could be construed so that, as the Government asserts, the exclusions must apply to something which, but for the exclusions, would come within the scope of the clause. On the other hand, the facts recited in 31 Comp. Gen. 268 indicate that a contractor claimed (unsuccessfully) that subsistence payments made by him should be considered part of what the Comptroller General found were "wage rates," subject to adjustment under an escalation clause. Since a contractor on at least one occasion contended that subsistence payments were subject to escalation, an understandable reaction of Government specification writers would be to include in later invitations, as an abundance of caution, admonitory statements that subsistence payments will not be adjusted under escalation clauses.

Unquestionably, the intendment of the Comptroller General's decision in the instant case (B-142040, dated April 1, 1960) is that in some circumstances an increase which is denominated "wages" will not be entitled to escalation. The Comptroller General stated:

* * * the Government is not liable as a matter of law for escalation on the full amounts of the increases in the nominal wage rates, if in fact the increased rates include elements of subsistence or travel pay or other items excluded from consideration by the third subparagraph of that article.

*Not in chronological order.

The Board has held ¹ that it is bound by rulings of the Comptroller General on specific questions of law. Because interpretation of the escalation provisions of Paragraph 19 is a mixed question of law and fact, and the Comptroller General's review of the matter was made without a presentation of facts or argument by the appellant, the Board does not view its range of decision necessarily to be limited by the above-quoted statement. This is not to say, as the Government suggests, that the Board has decided that it is only necessary for the appellant to present to the Government a schedule of increased hourly wage rates negotiated with the unions in order to be entitled to escalation.

Although the Government strongly asserts that the Board ignored admissions against interest in weighing the evidence in this case, most of the actions or statements of employees of the appellant which are advanced as admissions can be considered to be admissions only if the following two premises are adopted as controlling in this case:

(1) That the appellant was somehow recreant in an obligation to the Government when it took the stand in 1959 that it was no longer reasonable or equitable for the five basic crafts to demand subsistence or an expense allowance as part of the benefits to be accorded to these crafts by the appellant at the Glen Canyon site in succeeding years.

(2) That remote pay necessarily is subsistence rather than wages.

The appellant was excused from paying free board and room to the five basic crafts under the arbitration proceedings instituted under the 1955-59 agreement that had been signed by the appellant and the unions, the terms of which agreement were available for evaluation at the time the appellant prepared and entered its bid. Reliance on this fact in later collective bargaining seems to the Board to have been completely legitimate and justifiable action by the appellant. One of the Department Counsels observed during the hearing that anything is a proper subject for collective bargaining between unions and contractors that either of the parties suggest. Neither the circumstantial nor the other evidence in this case points to bad-faith conduct in the negotiations in 1959 that led up to the signing of the Project Agreement between the appellant and the five basic crafts.

In considering the meaning of "remote pay," the Board believes that there must be a limit on the extent of allowable modification of the usual meaning of a term. We have reconsidered all extrinsic facts and circumstances and the expert testimony relating to the proper meaning of remote pay in this case, and have concluded that for the five basic crafts remote pay must be regarded as wages rather than subsistence. The contracting officer acknowledged that wage

¹ *Reid Contracting Company, IBCA-74, December 19, 1958; 58-2 BCA par. 2037.*

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variances exceeding statewide rates for industry have existed in contracts for the Hungry Horse, Canyon Ferry, and Flaming Gorge Dams and that these increased wages were escalated. Escalation has been approved by the Government at Flaming Gorge on wages which include a \$0.20 increase over rates found elsewhere throughout the state, pursuant to Bureau of Reclamation escalation provisions almost exactly the same as the provisions in this case.

The Government has gained the impression from the Board's principal decision that direct or testimonial evidence as a class is considered superior to circumstantial evidence. To set this matter at rest the Board announces agreement with the Government's quotation from Wigmore, *The Science of Judicial Proof*, 3d Ed., Title V, p. 794, that—

* * * *Some circumstantial evidence is more valuable and convincing than some testimonial evidence, and "vice versa," that is all that can be said.*

In this appeal the Board has concluded that the "vice versa" situation without question applies to the \$0.50 wage increase to the five basic crafts. The appellant by the preponderance of evidence has shown a good-faith wage increase for these crafts.

In the Board's decision, reference was made to the unions' "demands for wage increases as a *quid pro quo* for the loss of valuable benefits." The Government at several places in its motion for reconsideration referred to this as a Board finding that the \$0.50-per-hour wage increase was a *quid pro quo* for subsistence. This only points up the Board's disagreement with the Government's adamantly held view that the five basic crafts could not lose, at any time during the life of the Glenn Canyon project, rights to or justification for a subsistence or expense allowance from the appellant.

The Electricians. As has been indicated above, and as the Comptroller General's decision suggests, when Paragraph 19, the escalation clause, is considered, the appellant should not be extended complete latitude to apply another name—wages—to payments which for many years have been listed and regarded as subsistence. The 1955-56 Electricians' Agreement and its successor agreement, which expired in June 1958, provided that on isolated jobs where travel expense was prohibitive from a town where the union had an employer under agreement, the employer was required to furnish board and lodging each day or in lieu thereof a minimum "expense" or subsistence of \$7 per day per man on a 7-day basis. This provision was applicable to the Glen Canyon project.

The Inside Agreement that followed, covering June 20, 1958, to June 20, 1959, contained no provision for free board and room or subsistence on a per diem basis. Instead, concentric wage rate zones

were established, with the appellant, through its subcontractor, being required to pay the highest, or Zone D rate of \$4.90 per hour.

The contracting officer testified that Arizona was the only place where subsistence for electricians had been "cut out" and wages raised. He also testified that this action, in his opinion, was a subterfuge to get more money, and that the appellant's bid should have contained a component for the payment of subsistence throughout the job. The latter conclusion was based upon the fact that there has been a custom in the electrical industry throughout the United States under which subsistence payments are made to electricians on jobs which are removed from a union office. Such inclusion is for the life of the job and does not depend on the availability of housing or other facilities.

At the time of bidding the appellant could have had only scant hope that subsistence costs for the electrical workers could be eliminated by the furnishing of houses, trailer sites, and other facilities. There was no provision in the Electricians' Agreement which was effective at that time corresponding to the "Remote Projects" paragraphs of the 1955-59 agreements with the five basic crafts. As is outlined in the Board's principal decision, under the "Remote Projects" paragraphs, the appellant upon furnishing certain residential housing facilities was entitled to a finding that the remote status of the Glen Canyon area no longer existed, and the obligation to furnish free room and board or \$6 a day in lieu thereof to members of the five basic crafts would be at an end. By going to arbitration the appellant in fact obtained removal of the remote status.

Other circumstantial guarantees² of the bona fide nature of claimed wage increases exist with respect to the five basic crafts, but not to the electricians. First, there is the fact that if all of the \$1.10 per hour is viewed as wages, this increase is a higher percentage of what the electricians had been receiving as wages than the corresponding percentage obtained by any of the five basic crafts. Yet the five basic crafts obtained their increases only after a 6-month strike and a great deal of strife, while it appears from the record that the electricians' increase was obtained with relatively little difficulty. Under the 1957-58 agreement, a journeyman wireman received wages of \$3.45 per hour. Under the 1958-59 agreement, the amount listed

² On the first day of the hearing, one of appellant's counsel asked the contracting officer if he would not agree "that subsistence and the requirement to pay subsistence is a matter of fact that has to be determined by an examination of all the facts and circumstances, and it is not merely something which somebody might call it?" In a letter to the appellant dated October 1, 1959, the contracting officer advised that "obviously, all of the terms and conditions of such [labor] agreement as well as the surrounding circumstances would have to be considered in reaching a decision as to the applicability of the contract escalation provision to labor costs established by the agreement."

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as a wage rate for a journeyman wireman working on the Glen Canyon project is \$4.90. If accepted as such, this would be a wage increase of more than 42 percent.³

Second, the contractor engaged directly in collective bargaining with the five basic crafts, but neither the appellant nor its subcontractor participated in the negotiations which led up to the designation of the Glen Canyon area as a zone where the extra \$1.10 per hour was required to be paid. The appellant's counsel commented in their brief that this designation resulted from "this perhaps unfair and unjustified conduct of the electrical Union, in first, arbitrarily making a \$1.10 zone without the consent and participation of the Contractor * * *," and pointed out in their reply brief that the Glen Canyon Dam is the only large project more than 50 miles from any populated area in the state. Upon reconsideration it is found that including all of the extra \$1.10 per hour in a purported wage scale was an attempt to take an unwarranted advantage of the Government, not brought about by the appellant or its subcontractor, but nonetheless happening in a manner that created a windfall for the contractor. The appellant is not entitled to such a windfall under Paragraph 19.

Some of the factors which justify classification of the extra \$0.50 per hour obtained by the five basic crafts in the 1959 Project Agreement as wages would have been equally applicable to the electricians if their scale for the Glen Canyon area had been hammered out in collective bargaining directly with the appellant; therefore, all of the \$1.10 per hour should not be considered as excluded from escalation under Paragraph 19, as the Government contends. Since both parties have taken an "all or none" approach, there is very little in the record upon which to base a fair division of the \$1.10 per hour. Taking all applicable facts and circumstances of this case into consideration, the Board finds that \$0.80 per hour of the total \$1.45 increase granted to electricians working under the Zone D rate, established in June 20, 1958, to June 20, 1959, Inside Agreement, should be escalated under Paragraph 19 of the contract, and that such escalation should not be applied to the remaining \$0.65 per hour.⁴ Since \$0.35 of the \$1.45 total increase was a wage gain received by all Arizona electricians, the net effect of the Board's decision is the allowance of escalation on \$0.45 of the \$1.10 in dispute.

³ Compare this with the \$0.76 increase obtained by Universal Equipment Operators when the strike of the five basic crafts was settled in 1959. Starting June 1, 1958, the Universal Equipment Operator's rate was \$3.43 per hour, approximately the same as that of a journeyman wireman prior to the effective date of the latter's 1958-59 agreement. The raise accepted by the Universal Equipment Operators was approximately 22%.

⁴ Increases for classifications such as Foreman and Apprentice do not total exactly \$1.45 under the June 20, 1958, to June 20, 1959 Inside Agreement. \$9⁴⁵/₁₀₀ hours of such increases would be entitled to escalation on the basis of the same ratio as is indicated for the journeymen.

All statements or findings relating to the electrical workers in the Board's principal decision which are inconsistent with the above determination are hereby modified accordingly. Specifically, the first three paragraphs and the sixth paragraph of Section 28 of that decision, at 68 I.D. 28 and 29, are hereby modified so as to be consonant with this decision.

National Agreements. In the motion for reconsideration the Government has reiterated many of the views expressed in its post hearing brief on the "National Agreements" issue. Review of the matter has convinced the Board that its initial treatment of this issue was over-complicated. The following paragraphs are hereby substituted in modification of the five paragraphs of the principal decision which begin at 68 I.D. 13, after quotation of the "National Agreements" issue as put by Department Counsel:

The appellant refused to stipulate or to acknowledge this question as being in issue. Department Counsel in their post-hearing brief stated that "there can be no doubt that the question of the National Agreements is properly an issue in this appeal, and that the Board, under its regulations, has jurisdiction to consider legal questions presented in appeals coming before it * * *."

As a matter of law, it is not possible to accept the Government's theory on the "National Agreements" issue. This query is posed: Considering the various agreements and dealings between the appellant and the national and local unions, can it be seriously urged that the appellant and the local unions were not free on December 22, 1959, to adopt a new, local project agreement? The unions seemingly did not use or rely on the National Agreements except as a means to obtain unemployment benefits for their members. The insurmountable obstacle to the Government's attempt to rely on the National Agreements is the fact that the Bureau of Reclamation was only incidentally benefited by those agreements. The contracts with the national unions cannot be viewed as having been made for the benefit of the Bureau; therefore, the Government cannot expect to be extended any rights under those agreements.⁵

The Board finds that in the circumstances of this case the National Agreements did not have the effect of binding either the contractor or the unions in situations requiring special treatment of compelling local problems.

The Five Basic Crafts. The Board is not persuaded that it erred in reversing the contracting officer's finding that the amount by which the hourly wage paid to the workers of the five basic crafts in accordance with the December 22, 1959, agreements exceeds the basic wage rates paid by other contractors in the State of Arizona constitutes a subsistence payment and therefore is not subject to escalation. To the extent that the parties, at the time bids on the projects were called for and received, reasonably could have contemplated discontinuance of subsistence during the course of the job, the appellant had leeway to

⁵ *Graybar Electric Co. v. Doley*, 273 F. 2d 284, 1959, 4th Cir.; *First National Trust & Savings Bank v. Beckton*, 258 Mich. 227, 241 N.W. 821 (1932); *Cantrell v. Broadnax*, Texas Civ. App., 306 S.W. 2d 429 (1957).

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increase wages and rightfully call for application of the escalation clause.

The Government has objected to a sentence in the Board's decision in 68 I.D. 20-21. This sentence is a commentary on the validity of the contracting officer's view that the project agreement signed by the appellant with the five basic crafts in December 1959 is substantially the same as the Arizona Master Labor Agreements signed in May of the same year except for specified differences in wage rates and per diem expense allowances. Upon reconsideration, the Board agrees that there is merit in the Government's criticism of this sentence,⁶ and it is hereby modified to read as follows:

The existence of such differences has some value as an offset to the evidence offered by the Government to the effect that the appearance of a wage increase following the elimination of subsistence provisions is persuasive of the inclusion of subsistence in the increased wage rates; however, completion of the residential housing and other facilities, the removal of the remote project designation in January 1959, and insistence by the unions that they were entitled to a wage increase plus their view that they would get it if they held out long enough, as discussed in detail earlier in this decision, are far more convincing factors in support of the contractor's claim.

Conclusion

The arguments advanced by the Government in its motion for reconsideration do not warrant a change in the Board's prior decision, that the payment of the increase of \$0.50 per hour by the appellant to its employees pursuant to the project agreements of December 22, 1959, with the five basic crafts, which increase is in excess of basic rates paid by other contractors in the State of Arizona, is entitled to escalation under Paragraph 19 of the contract as wages actually paid.

Because of the extent of, and the circumstances surrounding, the increase granted to employees of the appellant's subcontractor under the 1958-59 Electricians Agreement, we have concluded on reconsideration that a portion of this increase is not entitled to escalation under Paragraph 19 of the contract. The Board's prior decision is modified to deny escalation to the portion specified above in this decision. Except for this modification, and for revisions in the content of the principal opinion which we have made herein, the principal opinion is affirmed.

DEAN F. RATZMAN, *Alternate Member*.

I concur:

THOMAS M. DURSTON, *Member*.

⁶ The third sentence of the second paragraph of Section 18 of the principal decision, which relates to Paragraph 30 of the findings of fact.

PAUL H. GANTT, CHAIRMAN, disqualified himself from participation in the consideration of this appeal (43 CFR 4.2).

HERBERT J. SLAUGHTER and JOHN J. HYNES, *Members*, being absent on sick leave, took no part in the reconsideration of this appeal.

DECEMBER 29, 1961.

The Honorable the SECRETARY OF THE INTERIOR.

DEAR MR. SECRETARY: This is in response to your letter of December 26, 1961, requesting my consideration of two opinions of Solicitor Frank J. Barry of your Department relating to the applicability of the acreage restrictions of the Federal reclamation laws. One of the opinions is concerned with the San Luis project authorized by the act of June 3, 1960 (74 Stat. 156) and the other with the Kings River and Kern River projects constructed under the authority of the Flood Control Act of 1944 (58 Stat. 887).

In the Kings and Kern River opinion Mr. Barry has concluded that the Federal reclamation laws do not authorize the Secretary of the Interior to enter into a contract with water-user organizations being serviced in the Kings and Kern River areas which provides that they may be freed of the excess-land restrictions of those laws by making a lump-sum or accelerated payment of the construction costs allocable to them. I agree with this conclusion.

The San Luis situation presents, in my judgment, a most difficult problem. Mr. Barry has concluded in his San Luis opinion that the act of June 3, 1960, does not require that a contract executed by the Secretary of the Interior and the State of California pursuant to section 2 of the act contain provisions applying the excess land limitations of the Federal reclamation laws to the "State's service area," i.e., the lands outside the "Federal San Luis unit service area" referred to in the act.

As you know, the policy of the Federal Government requiring acreage restrictions in federally financed reclamation projects is one of long standing and one not lightly abandoned. The Congress insisted upon the application of this policy in the Federal service area. Whether or not they intended the policy to apply to the State service area is not free from doubt. Strong arguments can be made to the effect that they did not intend to abandon the policy even within the area to be serviced by the State. The legislative history is far from conclusive. Nonetheless, after a careful examination of the relevant laws and legislative history, I concur in the conclusion of your Solicitor that the San Luis Act does not require that an agreement executed by you and the State of California contain provisions imposing the acreage restriction upon the State service area.

December 26, 1961

Having arrived at this conclusion as a matter of law, I would nonetheless urge you to seek a congressional re-examination of this question. I think that the Congress itself should make a clear determination whether or not the acreage limitations should apply in the State service area. Fortunately, under the provisions of the San Luis Act they will have the opportunity to do so, and I sincerely hope that they will take positive action in this respect.

Sincerely,

ROBERT F. KENNEDY,
Attorney General.

DECEMBER 26, 1961.

HON. ROBERT F. KENNEDY,
Attorney General,
Washington 25, D.C.

DEAR MR. ATTORNEY GENERAL: As you know, for some months the legal staff of this Department jointly with members of your staff have had under consideration questions relative to the applicability of the excess-land limitation provisions of the Federal reclamation laws.

Specifically, these questions are (1) whether the San Luis Act of June 3, 1960 (Public Law 86-488), requires the application of the land-limitation provisions to service by the State of California to lands outside the "Federal San Luis service area" in the event an agreement is concluded with the State of California pursuant to Section 2 of the San Luis Act and (2) whether the land limitations, as prescribed under the Federal reclamation laws, may be voided by accelerated or lump-sum repayment of construction costs, as would be the case under the proposed contracts with water-user entities in the Kings and Kern River projects which are pending in this Department.

These legal questions have been the subject of extensive consideration and exchange of view between members of our respective staffs. I take this opportunity to transmit to you a signed copy of each of the formal opinions of Solicitor Barry of this Department with the request that I be advised, formally, of the position of the Department of Justice as soon as possible. In view of the desirability of reporting to Congress as to San Luis by January 1, and because of the imminent expiration of the current interim contracts for the Kings and Kern projects, an expression of your Department's concurrence or nonconcurrence with Solicitor Barry's opinions will suffice.

Sincerely yours,

(Sgd.) STEWART L. UDALL,
Secretary of the Interior.

PROPOSED REPAYMENT CONTRACTS—KINGS AND KERN RIVER PROJECTS

Bureau of Reclamation: Excess Lands—Bureau of Reclamation: Recordable Contracts

The requirements of Section 46 of the Act of May 25, 1926 (44 Stat. 636, 649; 43 U.S.C. 423(e)), requiring recordable contract to sell excess lands at predetermined prices is not effected by the payment of construction charge.

Bureau of Reclamation: Excess Lands—Bureau of Reclamation: Anti-speculation

Congress, in establishing a limitation on the size of entries on public lands under Section 3 of the Reclamation Act of 1902 (32 Stat. 388), and on the maximum acreage for which a water right could be acquired under Section 5 of that Act, had as its purpose to provide homes on the arid lands of the West, the prevention of land monopoly, and the avoidance of speculation.

Bureau of Reclamation: Water Right Applications—Homesteads (Ordinary): Generally

Congress had as its purpose, in enacting the Act of August 9, 1912 (37 Stat. 265; 43 U.S.C. 541), the goal of affording reclamation homestead entrymen and water-right applicants vested rights to land and water so that they could raise money to finance farming activities.

Bureau of Reclamation: Excess Lands—Statutory Construction: Legislative History

Congress had no intent in the enactment of the Act of August 9, 1912 (37 Stat. 265; 43 U.S.C. 541), to modify the antispeculation and antimonopoly purpose underlying the excess-land provisions of the 1902 Act.

Bureau of Reclamation: Excess Lands—Bureau of Reclamation: Anti-speculation

Under Section 3 of the Act of August 9, 1912 (37 Stat. 265, 266; 43 U.S.C. 544), the Secretary may, in his discretion, deliver water to excess lands after payout. Such discretion, obviously, is to be exercised in a manner consistent with the goal of family-sized farms and the avoidance of monopoly and speculation in private holdings.

Bureau of Reclamation: Excess Lands—Bureau of Reclamation: Anti-speculation—Statutory Construction: Legislative History

The preconstruction requirement of Section 12 of the Reclamation Extension Act of 1914 (38 Stat. 686, 689; 43 U.S.C. 418), that owners of private lands agree to dispose of all lands in excess of the area deemed sufficient for the support of a family, was designed specifically to cope with the special problem of initially breaking up excess holdings and of preventing owners of excess lands from profiting by the existence of the project at the expense of purchasers.

*December 26, 1961***Bureau of Reclamation: Excess Lands—Bureau of Reclamation: Recordable Contracts—Bureau of Reclamation: Antispeculation**

The requirement of Section 46 of the Act of May 25, 1926 (44 Stat. 636, 649; 43 U.S.C. 423(e)), that the holder of excess land execute a recordable contract binding him to the disposition of excess lands, as a condition to receiving project water for such lands, was deliberately enacted by the Congress in further pursuance of its policy designed to secure the break-up of pre-existing excess holdings benefiting from the expenditure of Federal funds and to prevent such excess landowners from reaping an unearned profit at the expense of purchasers.

Bureau of Reclamation: Recordable Contracts—Bureau of Reclamation: Excess Lands—Statutory Construction: Legislative History

Section 46 of the Act of May 25, 1926 (44 Stat. 636, 649; 43 U.S.C. 423(e)), requiring that the holder of excess land execute a recordable contract as a condition to the receipt of project water is an extension of the policy embodied in Section 12 of the Reclamation Extension Act of 1914.

Statutory Construction: Administrative Construction

The Departmental regulation pertaining to public land entries, 43 C.F.R. 401.9, is based upon Section 3 of the 1912 Act. Such regulation cannot render nugatory the policy of Section 12 of the 1914 Act, pertaining to the breaking up of large landholdings.

Statutory Construction: Administrative Construction

Departmental actions and statements regarding excess lands prior to 1947 did not for the most part consider question of prepayment or early payment of construction charges, but involved question as to the effect of subsequent payments and assumed applicability of Section 3 of the 1912 Act. Such expressions, being different from the problem presented under the recordable contract requirement of the Omnibus Adjustment Act of 1926 and under its predecessor provision, Section 12 of the Reclamation Extension Act of 1914, have no bearing upon the applicability of the recordable contract requirements of Section 46 of the 1926 Act to repayment contracts.

Statutory Construction: Administrative Construction

The origin of the proposal to avoid the effect of Section 46 of the 1926 Act rests upon the Associate Solicitor's Memorandum Opinion, M-35004, of October 22, 1947, and Administrative Letter No. 303 of the Bureau of Reclamation, dated December 16, 1947.

Administrative Practice

The rule of administrative interpretation, affording to such interpretation the highest respect, is properly invoked only if the interpretation relied upon actually embraced the precise issue under consideration.

Regulations: Interpretation—Administrative Practice

An ambiguous regulation cannot be relied upon as an administrative interpretation.

Statutory Construction: Administrative Construction—Administrative Practice

The reliance upon administrative construction in the interpretation of a statute is to be restricted to cases where the construction is really one of doubt and where those to be affected have relied on the practical construction.

Administrative Practice

Administrative practice, no matter of how long standing, is not controlling when it is clearly erroneous.

Statutory Construction: Generally—Administrative Practice

The practice of an executive department will not be permitted to defeat the obvious purpose of a statute.

Administrative Practice

A practice of the Department indulged in without any real examination as to its validity is not shielded from reconsideration and reversal if found to be unsupportable.

Bureau of Reclamation: Excess Land—Secretary of the Interior

When payout of construction charges occurs, then the release of excess lands acquired subsequent to initial water service from restrictions upon water service is not automatic but is within Secretarial discretion. The exercise of such discretion must be compatible with the underlying objectives of the Reclamation law.

Bureau of Reclamation: Excess Land

The Chief Counsel Memorandum Opinion of July 1, 1914, approved by the Department of the Interior July 22, 1914 (43 L.D. 339), is explained.

M-36634

December 26, 1961

TO THE SECRETARY OF THE INTERIOR.

Subject: Excess-land limitations, Kings and Kern River projects.

There are now pending in the Department proposed contracts with water user organizations in the Kings and Kern River areas in California.

These contracts present questions on the meaning and applicability of the excess-land limitations of the Federal reclamation laws.

In the case of the Kern River contracts, the construction charges would be repaid in 180 days. In the case of the Kings River contracts, two optional forms have been provided. In one the construction charges allocable to a contracting entity may, as in the case of the Kern, be paid within 180 days. In the other, payment can be made in 40 annual installments with an option in the contractor to pay the

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entire balance at any time. No excess-land provisions are contained in the contracts payable in 180 days. In the contracts payable in 40 annual installments, to get water for their excess lands the water users must agree to sell excess holdings at a nonproject price¹ within 10 years. If not so sold at the end of 10 years, the Secretary will have a power of attorney to sell them. Payment of the construction charges within the 10-year period cancels the agreement to sell.

The issue as to the Kings and Kern contracts turns upon a consideration of the excess-land requirements of the Federal reclamation laws.²

Excess-Land Limitations

Four major Federal reclamation laws have prescribed generally applicable excess-land limitations: The Act of June 17, 1902,³ hereinafter referred to as the 1902 Act; the Act of August 9, 1912,⁴ hereinafter referred to as the 1912 Act; the Reclamation Extension Act of August 13, 1914,⁵ hereinafter referred to as the Extension Act or the 1914 Act; and the Omnibus Adjustment Act of May 25, 1926,⁶ hereinafter referred to as the Adjustment Act or the 1926 Act.

The 1926 Act, as did the 1914 Act, requires that an excess owner must by contract with the Secretary agree to the disposal of such lands at a predetermined price. The requirement under Section 46 deals with owners who already hold excess lands at the time of initial water delivery. The question here is whether under Section 46 of the 1926 Act contracts may be validly written which provide for avoidance or termination of this requirement by payment of construction charges. This issue is distinct from another—the effect of payout upon the delivery of water to landowners who voluntarily become excess holders after initial water delivery. The former issue concerns the breakup of pre-existing holdings. As to it, we must look to the 1926 Act, and to its antecedent, the 1914 Act, for the answer. The latter issue concerns the effect of excess-land limitations upon the coalescence of holdings. As to it, as will be shown, the 1902 and 1912 Acts, rather than the 1926 Act, are relevant.

The justification in the pending contracts for excusing the water users from compliance with the excess-land laws is an extension of

¹ The term "nonproject price" in this opinion is a shorthand reference to value determined as provided in Section 46 of the 1926 Act, *infra*.

² The Kings and Kern River projects (Pine Flat and Isabella Reservoirs) serve areas in the Central Valley Basin of California, but are not a part of the Central Valley project. They are Corps of Engineers projects authorized by the Flood Control Act of 1944 (58 Stat. 887). Reclamation law governs these contracts by reason of Section 8 of the Flood Control Act of 1944. See opinion of the Attorney General, December 15, 1958 (41 Op. Atty. Gen. 66).

³ 32 Stat. 388.

⁴ 37 Stat. 265.

⁵ 38 Stat. 686.

⁶ 44 Stat. 636.

a line of reasoning set forth in two previous Departmental opinions. The first of these was addressed, on July 1, 1914, to the Secretary of the Interior, by Will R. King, Chief Counsel of the Reclamation Service. The opinion (attached, Appendix A) concludes that the proviso in Section 3 of the 1912 Act should be construed "to permit the furnishing of water for land on which payment in full has been made of building and betterment charges even when more than 160 acres of such land is owned by one person."

The proviso reads as follows:

* * * no person shall at any one time or in any manner, except as hereinafter otherwise provided, acquire, own, or hold irrigable land for which entry or water-right application shall have been made under the said reclamation act of June seventeenth, nineteen hundred and two, and acts supplementary thereto and amendatory thereof, before final payment in full of all installments of building and betterment charges shall have been made on account of such land in excess of one farm unit as fixed by the Secretary of the Interior, as the limit of area per entry of public land or per single ownership of private land for which a water right may be purchased respectively, nor in any case in excess of one hundred and sixty acres, nor shall water be furnished under said acts nor a water right sold or recognized for such excess * * *.

The second opinion is a memorandum to the Commissioner of the Bureau of Reclamation, signed by Felix S. Cohen, Associate Solicitor, dated October 22, 1947 (M-35004). This opinion (Appendix B) concludes with the statement:

* * * upon full payment of construction obligation under a joint-liability repayment contract, the lands receiving water under such contract are, under the provisions contained in section 3 of the Act of August 9, 1912, relieved of the statutory excess-land restrictions.

Cohen's conclusion was that King's interpretation of the 1912 Act controlled the construction of the 1926 Act. However, legislation enacted subsequent to the issuance of the King opinion⁷ renders it irrelevant to the issue presented as to the effect of payment upon Section 46. The Cohen opinion is in error as it not only ignored that subsequent legislation but relied on a misreading of King for support.

Because of the great importance of these issues, I have undertaken a thorough review of the reclamation laws and of their legislative history. I have concluded that the land-limitation requirements of Section 46 relative to disposition of pre-existing excess holdings cannot be avoided or their application frustrated by early payment of a contractor's repayment obligation⁸ and that payout is a relevant

⁷ The 1914 Act, *infra*.

⁸ Strictly speaking, the recordable contract is, as a matter of law, completely unaffected by payout regardless of its timing. Ordinarily, however, disposition of lands pursuant to recordable contracts would be expected to have occurred long before the usual repayment period has run its course so that by the end of that period few, if any, lands would in the usual case remain subject to the recordable contracts.

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factor only in connection with the effect of excess-land limitations on the coalescence of holdings. Consequently, the contracts before you are not valid.

While the 1902, 1912, 1914, and 1926 Acts have a consistent purpose—the encouragement of family-size farms and the avoidance of speculation—the excess-land limitations of the two earlier statutes, that of 1902 and 1912, differ significantly in their operation and effect from the two later enactments of 1914 and 1926.

Each of these statutes must be considered in the light of its own statutory setting and with due regard for the considerations prompting its enactment. What Congress sought to accomplish by the enactment of a particular law or the evil sought to be remedied thereby are proper considerations in determining the meaning to be given to a statute or the words contained therein. *Tinker v. Modern Brotherhood*, 13 F.2d 130; *Church of Holy Trinity v. U.S.*, 143 U.S. 457. Care must, therefore, be taken to avoid approaching laws dealing with any field as though they were the product of a cement mixer in which the individual enactments of the Congress lose all identity and the specific instructions of Congress are ignored. The overriding consideration in construing any statute or group of related statutes is to ascertain and give effect to the intent of the legislature. *Flora v. U.S.*, 357 U.S. 63; *U.S. v. C.I.O.*, 335 U.S. 106.

With these considerations in mind, we proceed to an examination of the statutes.

Under the 1902 and 1912 Acts the limitation is in the form of a prohibition upon entry of public lands and upon the delivery of water for excess lands. No requirement for sale of excess lands is imposed. On the other hand, the crucial element of the 1914 and 1926 Acts lies in their requirement for the sale of excess lands at a limited price. This difference, as we shall see, is vital; it is dispositive of the questions before us. The change came about because of the resolve of the Congress, as a matter of deliberate policy, to prescribe by statute measures aimed specifically at the early breakup of pre-existing large holdings. The Congress so acted, as will be demonstrated, because the 1902 and 1912 Acts had not achieved any substantial breakup of large pre-existing private holdings.

As the excess-land provisions have evolved from 1902 to the present, the purpose of the Congress has been consistent. The changes that have been made have been in the means to accomplish the end, never to change its fundamental purpose. As the law has evolved the Congress has sought not to weaken but to strengthen; not to open loopholes but to close them; not to encourage speculation but to stop it.

1902 and 1912

Prior to the enactment of the 1902 Act, Congress had no experience with what we know now as reclamation law. The earlier homestead law, which had been found adequate to encourage the settlement of lands east of the 100th Meridian, only required that, after compliance with its provisions, the United States would convey title by patent to the entryman or his successor in interest. Water was provided to such lands by nature. No great investment was required to bring such lands into production nor to insure the continuance of a water supply, as was later required on arid lands farther West.

Accordingly, the reclamation laws, at least in their earlier form, must be regarded as an experiment.

The Reclamation Act of 1902 provided that the receipts from sales of public lands in 16 States and territories in the arid West would be applied to the construction and maintenance of irrigation works for the storage and distribution of water.

The only expense not reimbursable in the entire program was the administrative expense.⁹ Those who benefited by the works were expected eventually to pay for them. In the 1902 Act the term of payment was 10 years. The fundamental purposes of encouraging homebuilding and of prevention of land monopoly and speculation, in particular, were to be accomplished through the operation of two provisions—Section 3 of the 1902 Act which made the public lands subject to entry in tracts not exceeding 160 acres¹⁰ and Section 5 which provided that, while private lands could be included in the projects, water could not be obtained for such private lands in tracts exceeding 160 acres.¹¹

Section 3 of the Act also provided "that the commutation provisions of the homestead laws shall not apply to entries made under this act." The commutation provisions of the homestead laws (43 U.S.C. 173) had offered a cash alternative to the requirement of personal residence on the entry. This section in itself strongly intimates that an early cash payout was not intended to relieve from the excess-land restrictions of the 1902 Act.

The legislative history of the 1902 Act reveals that the excess-land limitations included therein constituted one of its principal and most important features.

Planks in the Republican and Democratic platforms in 1896 and in 1900 had recommended the enactment of national legislation for the reclamation of arid lands in the West. Both parties called for the adoption of such legislation in furtherance of a policy to provide

⁹ 35 Cong. Rec. 6681.

¹⁰ Sec. 3, 1902 Act.

¹¹ Sec. 5, 1902 Act.

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homes on the public domain and to make such lands available for actual settlers.¹²

Large numbers of European immigrants had been pouring into the Eastern States for several decades. The cities were crowded in many cases with unemployed people who, by reason of differences in language and culture, were difficult to assimilate.¹³ Public lands available for entry and suitable for cultivation were running out. The safety valve which the United States had had during the 19th century was no longer available and America was beginning to feel the strain of unemployment which theretofore had been relieved by the westward expansion. During the debate in the House, Representative Newlands, of Nevada, by whose name the 1902 Act became popularly known, said:

We have not felt in this country the evils of land monopoly. Lord Macauley said we never would experience the test of our institutions until our public domain was exhausted and an increased population engaged in a contest for the ownership of land. That will be the test of the future, and the very purpose of this bill is to guard against land monopoly and to hold this land in small tracts for the people of the entire country, to give to each man only the amount of land that will be necessary for the support of a family—not more than 80 acres in the southern part of the arid region and not more than 160 acres in the northern part, where cultivation is less intensified. Convey this land to private corporations and doubtless this work would be done, but we would have fastened upon this country all the evils of land monopoly which produced the great French revolution[,] which caused the revolt against church monopoly in South America, and which in recent times has caused the outbreak of the Filipinos against Spanish authority.¹⁴

In the meantime land was available in Western Canada. "It is estimated," said Representative Newlands, "that this very year 50,000 Americans have gone across the border into Canada for the purpose of locating upon the cheap lands of the Dominion."¹⁵

The reclamation bill passed the Senate unanimously after a short debate.¹⁶ The understanding of the Senate as to the purpose of the bill was expressed by Senator Clark, of Wyoming, one of its supporters:

I ask any unbiased Senator upon this floor to read carefully the provisions of the bill and proposed law with the amendment and find in any line or sentence of the same any avenue which is not safeguarded against the undue accumulation of public land in private hands. On the contrary, the purpose of the bill, the effect of the bill honestly administered, would be to make individual homes in small areas, and would most effectually prevent the accumulation of large holdings in the hands of speculators, cattle barons, or sheep kings.¹⁷

¹² 35 Cong. Rec. 6672-74.

¹³ 35 Cong. Rec. 6748.

¹⁴ 35 Cong. Rec. 6734.

¹⁵ 35 Cong. Rec. 6673.

¹⁶ 35 Cong. Rec. 4981, 6674.

¹⁷ 35 Cong. Rec. 2222.

After passage in the Senate, President Roosevelt consulted with members of the Irrigation Committee of the House. "He was somewhat in doubt as to whether the bill was sufficiently guarded in the interest of homeseekers." Accordingly, certain changes were made to the satisfaction of the President and the Irrigation Committee and were incorporated in the bill which was reported to the House.¹⁸

The debate in the House was much more extended. Reference was made to the planks of the major political parties on the subject of reclamation. In the President's message, he had recommended "that the land reclaimed should be reserved by the Government for actual settlers."¹⁹ Time and again the purpose of the bill was declared to be to provide homes on the arid lands of the West and to prevent land monopoly and speculation.²⁰

It was argued against the bill that reclamation ought to be carried out by private enterprise. The answer was that encouragement of large holdings would be inconsistent with American land policy²¹ and would sow the seeds of revolution.²²

It was also argued that the act was intended to favor monopoly, especially the railroads. To this Representative Sutherland, of Utah, later Associate Justice of the Supreme Court, answered:

The bill expressly provides that the public lands which may be irrigated by the works to be constructed are subject to entry only under the homestead laws of the United States, in tracts not exceeding 160 acres. It also forbids any person to acquire a right to irrigate more than this quantity of land and requires actual residence upon the land. The railroad lands are not held in vast bodies, but are in alternate sections, and it is not to be expected that settlers who may procure public lands free of charge will pay extravagant prices for railroad lands immediately adjoining them.²³

It should be noted that in the 1902 Act nothing required a private landowner to include all his land in the project. Thus he might legally apply for water for one farm unit and hold his excess lands for sale to settlers at far higher prices than could be obtained had the project not been built.²⁴

Another feature of the 1902 Act was that an entryman under the homestead laws got no title until the building and betterment charges had been paid in full (Section 5). This proved to be a burdensome

¹⁸ 35 Cong. Rec. 6674.

¹⁹ 35 Cong. Rec. 6677.

²⁰ 35 Cong. Rec. 6734, 6751, 6755, 6758, 6761, 6767, 6769.

²¹ 35 Cong. Rec. 6676, 6758.

²² 35 Cong. Rec. 6734.

²³ 35 Cong. Rec. 6769.

²⁴ See remarks of Representative Hayden during the debate on the Extension Act, p. 26, *infra*.

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provision for entrymen as their land could not be used as collateral to borrow the money necessary to finance the development of their farms.

Accordingly, in February 1912, Senator Borah, of Idaho, introduced S. 5545 which was intended to enable the homestead entryman "to mortgage his property for the purpose of raising funds with which to continue its development or to meet any unexpected obstacles to its profitable cultivation, or any unanticipated drain on his financial resources."²⁵

The bill passed the Senate without significant change.²⁶ When it arrived in the House it provided only for the rights of entrymen. No provision was made for the vesting of water rights in owners of private land.²⁷

S. 5545 was referred to the Committee on Irrigation of Arid Lands where it was modified to extend the benefits of the bill to water-right applicants for private lands.²⁸

The hearings and reports up to this point offer little to aid in the interpretation of the bill. On July 15, 1912, the bill was on the House unanimous consent calendar. As soon as the bill was called for consideration, Congressman Mondell, of Wyoming, indicated that, because of objections to the bill in its then form, he wished to propose a substitute bill and sought unanimous consent. Discussion of this procedure followed.

Before the issue was resolved Congressman Raker, of California, got the floor and objected that the bill would repeal the "fundamental principle" of the 1902 Act, namely, "the intention that each man should have a homestead, that he should not barter or sell it, but that he should have the water right to but 160 acres of land * * *."²⁹ He was evidently directing his remarks to the proposed substitute, the text of which had not been printed in the Congressional Record and was not contained in any report.

The language of the bill which had been reported and for which a substitute was to be offered is found in 48 Cong. Rec. 4800, 4980-81. There is no reference whatsoever to acreage limitation. The effect of the legislation would merely have been to vest title on compliance with the homestead laws and to give the United States a first lien for the unpaid building and betterment charges not yet due. Mr. Raker's concern was that since the settler was given title he could sell, and there was no restriction on the accumulation of several farm units by one person.

²⁵ Report of Secretary of the Interior Fisher quoted in S. Rept. 608, 62d Cong., 2d Sess.

²⁶ 48 Cong. Rec. 4981.

²⁷ 48 Cong. Rec. 4800, 4980-81.

²⁸ H. Rept. 867, 62d Cong., 2d Sess.

²⁹ 48 Cong. Rec. 9083.

The only issue before the House at that time was whether unanimous consent would be given to consider either the Senate bill or the Mondell substitute.

Mr. Raker's comments were interrupted by objections to further consideration and S. 5545 was accordingly stricken from the calendar.²⁹ On July 19 it was returned to the committee³⁰ and the same day the committee reported (without comment) the act in the form in which it was enacted.³¹ It was passed by the House without debate on July 29³² and by the Senate without debate on July 30.³³ There is no suggestion that the substitute referred to by Mr. Mondell is the bill which was finally passed, although the bill finally passed is completely different in wording from S. 5545 as amended in the Senate and by the House Committee on Irrigation of Arid Lands.

On August 6, 1912, Secretary of the Interior Fisher reported to the President on the enrolled bill S. 5545 as passed by the Congress. Concerning the proviso in Section 3, he said:

The same section contains a proviso to prevent the consolidation of holdings until such time as full and final payment of the building charge shall have been made. By that time it is believed that the land will be in the hands of permanent settlers and speculative holdings eliminated.

The purpose of the 1912 legislation was to give to homestead entrymen and to the owners of private lands who had applied for water-right certificates a vested right so they could raise money to finance their farming activity. At no time was it ever suggested that there was any purpose to modify basic objectives of the excess-land provisions of the 1902 Act.

At the time of the enactment of the 1912 Act a private landowner could not, at least before payout, get water for lands in excess of 160 acres. Furthermore, no practice of payment of all charges in advance to avoid the application of the 160-acre limitation was apparent. Hence, when the proviso in Section 3 of the 1912 Act says, "No person shall * * * hold irrigable land * * * before final payment * * * in excess of one farm unit * * *," it was referring to a person who had not more than 160 irrigable acres under water-right applications and it was not expected that a person would get water for any more land for at least 10 years. To find in this language of the statute justification for holding that as a matter of law landowners need never comply with an express statutory requirement subsequently enacted that they divest themselves of their initially held excess lands is absurd. In-

²⁹ *Ibid.*

³⁰ 48 Cong. Rec. 9310.

³¹ H. Rept. 1032, 62d Cong., 2d Sess.

³² 48 Cong. Rec. 9847.

³³ 48 Cong. Rec. 9853.

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deed, the interpretation of Secretary Fisher, when speaking of the date when the building charges would have been paid in full, said: "By that time it is believed that the land will be in the hands of permanent settlers and speculative holdings eliminated," directly contradicts the proposition that advance payout necessarily could have relieved even under the 1902 and 1912 Acts.

The proviso is sufficiently ambiguous to justify the construction placed upon it by Mr. King. King, it will be recalled, had concluded that the 1912 Act could be construed "*to permit*" delivery of water after payout to excess lands. [Italics supplied.] He did not hold that such deliveries could be demanded as a matter of right. Nor can King's opinion be so extended when considered in the light of the strong antimonopoly, antispeculation, and homebuilding purposes underlying the 1902 Act. Even the short debate on the 1912 Act would indicate that the Congressional purpose continued to be to provide homes for families in the West and to prevent land monopoly and land speculation.

Neither the legislative history of the 1902 Act nor that of the 1912 Act was analyzed in the King opinion in order to determine whether there might indeed be discernible a Congressional policy to limit, under certain circumstances, the amount of land for which water might be delivered after payout.

In the light of the legislative history of both statutes, I cannot read the King opinion as meaning more than that the Secretary may permit the delivery of water under an individual water-right application to excess lands after payout if by doing so he does not nullify Section 5 of the 1902 Act.

To read the ambiguous proviso to Section 3 of the 1912 Act as vesting in a large landowner the right to compel delivery of water by the mere fact of immediate payout would place in such landowner the power to circumvent a fundamental policy of the law. I cannot read the proviso to Section 3 of the 1912 Act in such self-defeating terms. See *United States v. Shirey*, 359 U.S. 255. The proviso must be measured against the provisions of the entire Reclamation Act of 1902. *Labor Bd. v. Lion Oil Co.*, 352 U.S. 282; *United States v. Brown*, 333 U.S. 18. When so measured, we need not and should not let the proviso swallow up the entire act.

Accordingly, I conclude that the King opinion is not to be read as meaning more than that the Secretary may (but need not) permit the delivery of water under individual water-right applications for more than 160 acres after payout and that his discretion obviously is to be exercised in such fashion that the purposes of the law are achieved rather than frustrated. The purpose of fostering family-size farms

and opposition to monopoly and speculation in private holdings pervades the 1902 and 1912 Acts and careful reading of these Acts and their legislative history manifests the legislative intention that the Secretary exercise his authority to accomplish these purposes. The principle involved was most aptly stated by Secretary Seaton in his letter to Mr. Philip Gordon, President of the Kings River Conservation District, dated July 12, 1957: "As Secretary of the Interior, it is my duty not only to conform to the technical provisions of the law but also, within whatever discretion I may have, to seek compliance with the principles on which the legislation rests * * *. Where discretion may be vested in the Department or the Secretary, that discretion should be exercised to obtain compliance with the principles on which the legislation is enacted. What I am concerned about is a process by which inferences are based on inferences and there is a whittling away at a principle until all that is left is a pile of shavings."

It should be noted that the King opinion was rendered July 1, 1914, and that the Extension Act of 1914 bears the date of August 13. King could not construe an act which had not yet become law. Of course, he made no reference to the 1914 Act and its effect. Nor did he take any cognizance of the Congressional debates on the then pending bill.

1914 and 1926

At the time the 1914 Act was being considered in the Congress some 12 years of experience had been had with the reclamation law and certain serious defects had been discovered. Principally, it had developed that, notwithstanding the 1902 Act's limitation on the delivery of water to more than 160 acres in single ownership, there had been continued failure on the part of owners of large blocks of lands to break up their holdings by sale in family-sized units. This was because the Act did not require a landowner to sell his excess lands to be included in a project. While agreements had been entered into by the Reclamation Service with water-user associations and other organizations by which privately owned lands were included in projects with the owners of excess lands agreeing to subdivide and sell to purchasers eligible to make water-right applications, the results had been disappointing and retention of privately owned lands remained widespread.³⁴

Not having sold their excess lands, private landowners had only to wait until the cheaper lands had been taken by the earlier settlers. Although no water was being delivered to their excess lands, the lands

³⁴ 14th Annual Report of the Reclamation Service, p. 15.

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were eligible for water deliveries to qualified applicants. The private landowners would hold their lands until the prices had risen and then sell them at high prices. Thus they reaped for themselves the profits intended for the settlers.

Under the 1902 and 1912 Acts 10 years was allowed for the payment of construction charges. The pressures which included the enactment of the 1914 Act resulted from the fact that farmers who were actually cultivating their land were finding it unduly burdensome to develop their farms while at the same time paying back the Government over a 10-year period. The Congress undertook to grant them relief, but in such a way as to frustrate the designs of the excess landowners who wanted to retain their lands.

There was included in the 1914 Act, therefore, a section aimed specifically at the problem of the pre-existing large landowners. This is Section 12, reading:

Before any contract is let or work begun for the construction of any reclamation project hereafter adopted the Secretary of the Interior shall require the owners of private lands thereunder to agree to dispose of all lands in excess of the area which he shall deem sufficient for the support of a family upon the land in question, upon such terms and at not to exceed such price as the Secretary of the Interior may designate; and if any landowner shall refuse to agree to the requirements fixed by the Secretary of the Interior, his land shall not be included within the projects if adopted for construction.

A number of provisions in addition to Section 12 were included in the 1914 Act to deal with this situation. Each of these provisions was designed to make it burdensome to retain excess lands.

Section 2 of the 1914 Act required initiation of payment of construction charges for private land even though no water-right application had been made. Section 5 required the payment of minimum operation and maintenance charges whether the land was irrigated or not. Section 8 authorized the Secretary to require the cultivation of progressively increasing amounts of irrigable land for each entry and for each water-right application; one-half the irrigable acreage was required to be in cultivation in five irrigation seasons. Section 9 imposed a 5-percent surcharge on the construction charge in the event water-right applications were not made within 1 year after public notice of the availability of water; the surcharge was continued annually until the water-right application had been made and the initial installment of construction charges had been paid. Sections 3 and 6 provided for penalties and forfeiture in the event of failure to pay construction or operation and maintenance charges when due. Section 13 required homestead entries containing more than a single farm

unit to be reduced and conformed, within a limited period, to a single unit.³⁵

These provisions taken together, as well as Section 12, paint a clear picture of Congressional determination to supplement the excess-land limitations of the 1902 Act in order to bring about the early division and development of private as well as public lands.

A review of the debates on the 1914 Act corroborates that such was indeed the intent of Section 12 and the other provisions. The report of the Senate Committee on Irrigation and Reclamation of Arid Lands, after referring to the first two sections of the bill, observed:

The remainder consists of general principles applicable to both and contains measures preventing large holdings for mere speculative purposes within these irrigation districts by requiring certain payments on all lands within the project on which water is ready to be furnished, whether the water is used on them or not, and further requiring that such lands within a specified time must come in on equal terms with the other lands or be excluded from the privilege of water use forever thereafter.³⁶

The House Committee, making specific reference to Section 12, reported:

Another very important provision of the bill preventing speculation may be found in Section 12, which provides that before the Secretary of the Interior shall hereafter undertake any new project he shall require the owner of private lands thereunder to dispose of all his lands in excess of the area deemed sufficient to support a family, upon such terms and at such price as the Secretary of the Interior may designate. If this provision shall be adopted speculation in lands under reclamation projects will be reduced to a minimum, and the burdens of the real farmer who undertakes to reclaim and cultivate the lands, and for whose benefit the reclamation law was enacted primarily, can be kept normal.³⁷

Senator Smith, of Arizona, in charge of the bill in the Senate, emphasized that it was designed to restrict "those who are attempting to get into these enterprises and monopolize the lands and do nothing

³⁵ Lands in excess of the conformed unit could be assigned by the entryman, but a proviso in the section contains a prohibition against a person taking by assignment more than one farm unit prior to payment of all charges.

Farm units could be and often were established at less than 160 irrigable acres under the Reclamation Act. Section 3 of the 1902 Act authorized units of "not less than 40 nor more than 160 acres for public lands" and Section 4 required that the limit of entry be the acreage which in the Secretary's judgment "may reasonably be required for the support of a family * * *." Prior to the Act of June 25, 1910 (56 Stat. 315), entry on public lands in a reclamation project could be made under the homestead laws before water was available and the size of farm units had been established by the Secretary.

The purpose of Section 13 was to require disposals of the excess where such pre-1910 entries had resulted in homestead entries greater in acreage than the prescribed farm units. The proviso is similar to the proviso in Section 3 of the 1912 Act and obviously has no application to the breakup of pre-existing private holdings under Section 12 of the 1914 Act.

³⁶ S. Rept. 312, 62d Cong., 2d Sess.

³⁷ H. Rept. 505, 63d Cong., 2d Sess.

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with them except to wait for an increase of value.”³⁸ Senator Smith elaborated:

The very bill that I am now trying to pass in this body provides absolutely the condition of which the Senator speaks as to all future projects.³⁹ The earlier projects had already men within them with patented lands, homesteads. Some men had bought quite a number of homesteads and owned farms of seven or eight hundred acres. One man on the far side of the river had a very large holding of patented land. Those lands are held by patents that the Government cannot affect at all except to require, as this bill requires, that they shall put water on it or shall dispose of it or else they do not get water. The object is to divide these tracts up into small homesteads of 50 or probably 160 acres.⁴⁰

Representative Taylor, of Colorado, floor manager of the bill, expressed its purpose to be to bring relief to the small, bona fide settler. He presented the bill as an appeal from the West “on behalf of these tens of thousands of homebuilders.”⁴¹ Representative Mondell, of Wyoming, referred to the high prices of private lands which added greatly to the burden borne by the settler who had also to pay the project construction charges.⁴²

Representative French, of Idaho, declared the purpose of the reclamation system was to effect the desirable breakup of large holdings “until the lands can be made to serve the greatest number of people who live upon the lands.”⁴³

Representative (now Senator) Hayden, of Arizona, pointed out that “certain men, taking advantage of the provisions of the reclamation act, have speculated upon the land in the project. We have attempted in this bill to cure that evil.” He cited figures showing that nearly 500,000 acres of privately owned land had been allowed to:

* * * remain in idleness, out of cultivation, in the hope of selling it unimproved to some future settler. Everybody knows that the Reclamation Act was not intended to serve any such purpose. The Act was designed to make homes for the many, not riches for the few.

Your committee has attempted to prevent the acquisition of this unearned wealth by the following provisions in this bill: First, by providing that under all projects there shall be a minimum operation and maintenance charge, whether the land is cultivated or not. That is to say, that whenever the irrigation works are completed so that water is available for delivery to the land, then the owner of the land shall pay his share of the operation and maintenance of the project whether he cultivates his land or not. The Government has done its part, and the water is ready for his use. It is unfair to the bona fide settlers who are im-

³⁸ 51 Cong. Rec. 5028.

³⁹ Senator Gallinger had expressed astonishment at learning in the course of the debate that there were individuals who owned tracts of several thousand acres in Federal reclamation projects, he having understood that farms were established in small tracts. Senator Clark, of Wyoming, also inquired how one could enter a larger acreage than the maximum of 160 acres the reclamation law allowed.

⁴⁰ 51 Cong. Rec. 5028.

⁴¹ 51 Cong. Rec. 12194.

⁴² 51 Cong. Rec. 12225.

⁴³ 51 Cong. Rec. 12232.

proving their lands that the whole of this burden should be put upon them. I know that I speak for all actual cultivators of the soil in my country in saying that they are in favor of this proposition.

We have also presented in this bill a section requiring that in order to maintain his water rights the landowner or entryman shall cultivate a certain proportion of his land, increasing the amount each succeeding year until three-fourths of the entire area is placed under cultivation. If he fails to do this, it is evident he is holding the land for speculative purposes, and we provide in that event for the forfeiture of his water rights.

We also have in this bill a provision which is based upon a recommendation made by a congressional investigating committee that visited certain reclamation projects last year * * *. That committee pointed out the evil of permitting the owners of large areas of land to bring their holdings within these projects without requiring them to fix in advance the price at which it shall be sold to settlers. We provide that any individual who owns more land than one farm unit, who desires in the future to come under one of these projects, shall agree with the Secretary of the Interior upon the terms on which he will dispose of his excess land. Hereafter it will be impossible for a speculator to reap all the advantage that would come from the enhanced value of his land by reason of its inclusion in a new project. The new settler is entitled to a share in this profit, and we intend to see that he gets it.⁴⁴

Representative Raker, of California, observed:

The only objection that can be made against the Reclamation Service, and that is being corrected, is that large tracts of land are held by private individuals when they agreed to sell them.⁴⁵

In urging the Senate's adoption of the conference report on the bill, Senator Smith, of Arizona, Chairman of the Senate Committee and in charge of the bill on the floor, thus summed up its intended effect:

This bill stops the monopoly of the holdings within these irrigation districts and forces the unused land to pay its part in the development, and breaks up monopoly in speculative land.⁴⁶

These comments by the sponsors of the legislation in the Congress are typical of the attitude generally expressed throughout the debates. The 1914 Act was intended to cure certain faults in the reclamation laws which had been disclosed by 12 years of practical experience. The hopes and anxieties of the architects of this legislation echoed the words of those who had written the 1902 Act. The intent of Congress had not changed. Congress still wanted to prevent the creation of land monopoly, to prevent speculation, and to provide land and water on reclamation projects exclusively for owner-cultivated, family-sized farms.

The legislative history of the Extension Act of 1914 is devoid of even the remotest suggestion that the restriction of Section 12 could be lifted or its purpose frustrated by immediate or early payout.

⁴⁴ 51 Cong. Rec. 12241.

⁴⁵ 51 Cong. Rec. 12957.

⁴⁶ 51 Cong. Rec. 13362.

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Section 1 of the Act explicitly provided an option in the water-right applicant or entryman to pay out the construction charges in less than the 20 years allowed. Nowhere was it argued or even hinted that such payout could overcome the command of Section 12.

On the contrary, it is clear by the repeated emphasis by the proponents of the Act upon the evils that had befallen the program and upon the ease with which large landowners had thwarted the Congressional purpose of the Reclamation Act that Section 12 had been specifically intended to prevent the exploitation of reclamation projects by owners of large blocks of land.⁴⁷

The men who declared the purposes and intent of Congress in the enactment of the 1902 and 1914 Acts are in the ranks of the legislative giants of the 20th century: Newlands, Mondell, Underwood, Sutherland, Hayden, Smith of Arizona, Taylor, Raker, etc., etc. To attribute a construction to the 1914 Act justifying the conclusion that the express requirement as a condition of coming into the project for sale of pre-existing excess holdings could be rendered nugatory would be to brand these men as either hypocritical knaves or fools. They were, of course, neither. They were the champions of the West—honest, respected, and important members of the Congress. A reading into Section 12 of justification for the proposition that early payout relieves would not only contradict its clear language but could not be reconciled either with the Act as a whole or with its legislative history. No rule of construction necessitates acceptance of an interpretation resulting in patently absurd consequences. *United States v. Brown*, 330 U.S. 18, 27.

Whatever may be said of ambiguity in Section 3 of the 1912 Act, the meaning of Section 12 of the 1914 Act is clear.

Here was a giant stride forward in implementing the homebuilding purposes of the reclamation law. Under the earlier statute an application for a water-right certificate was limited to 160 acres but no requirement to sell was imposed upon the owner of private lands in excess of that amount. Under the 1914 Act the owner of more than 160 acres could not participate in the project at all until he had agreed to sell his excess lands.

In an enumeration of the statutes dealing with the excess-land provisions of the reclamation laws, the opinion signed by Associate Solicitor Cohen includes the 1914 Act. That opinion, however, relies on King, who wrote before the 1914 Act became law. It makes no further reference to the 1914 Act and, accordingly, makes no analysis of it or its legislative history. The only conclusion possible is that the 1914 Act was overlooked.

⁴⁷ The danger of permitting unrestricted large ownerships in the midst of a reclamation project was discounted in the 1902 debates. See the remarks of Representative Sutherland quoted on p. 380, *supra*.

So we see that with passage of the 1914 Act Congress supplemented the excess-land requirements of the 1902 Act and the 1912 Act in order to cope more effectively with the problem of the pre-existing excess landowner.

The King opinion had dealt only with the 1902 and 1912 Acts. The 1914 Act was not then in existence.⁴⁸ With the passage of the 1914 Act dual excess-land requirements were placed in effect. As had been amply demonstrated, Section 12 of the 1914 Act was designed specifically to cope with the special problem of initially breaking up holdings and of preventing the owners from capitalizing on the benefits of Federal construction in the form of high prices charged to purchasers of their lands and it could not possibly be affected by payout. The other problem, that of subsequent coalescence of holdings, continued to be dealt with by Sections 3 and 5 of the 1902 Act and Section 3 of the 1912 Act. While the 1914 Act has been replaced by the 1926 Act, these dual limitations obtain today.

After World War I the reclamation program again came under close scrutiny. An exhaustive survey was undertaken by a special advisory committee, appointed by Secretary of the Interior Work. The advisers,⁴⁹ who came to be known as the Fact Finders, submitted their report to Secretary Work under date of April 10, 1924. President Coolidge transmitted their report to the Congress by message of April 21, 1924, in which he urged "the immediate necessity of revising the present reclamation law." The report is printed as Senate Document 92, 68th Cong., 1st Session.

⁴⁸ King, of course, as pointed out, *supra*, p. 383, makes no reference to the then pending 1914 legislation, nor is there any reference, in the debates or other materials leading to the enactment of the 1914 Act, to the King opinion.

⁴⁹ Thomas E. Campbell, Chairman, Elwood Mead, James A. Garfield, Oscar E. Bradfute, John A. Widdsoe and Clyde C. Dawson. Mr. Campbell, of Phoenix, Arizona, was a former Governor of that State and Chairman of the Colorado River Basin Project, 1921.

Dr. Mead, of Berkeley, California, was Professor of Rural Institutions at the University of California. He had been State Engineer of Wyoming, 1888-89; Chief of Irrigation and Drainage Investigations, United States Department of Agriculture, 1897; Chairman, State Rivers and Water Supply Commission of Australia, 1907-1915; had carried on an extensive consulting engineering practice in irrigation development and had written extensively on irrigation and engineering subjects. He became Commissioner of Reclamation on April 3, 1924, a few days before the Fact Finders' report was issued, and served in that capacity until 1946. Lake Mead, the reservoir formed by Hoover Dam, is named in his honor.

Mr. Garfield, of Cleveland, Ohio, the son of President Garfield, had been Secretary of the Interior under President Theodore Roosevelt.

Mr. Bradfute, of Xenia, Ohio, was President of the American Farm Bureau Federation and of the Ohio Farm Bureau Federation. He was also a member of the Board of Control of the Ohio Agricultural Experiment Station.

Dr. Widdsoe, of Salt Lake City, Utah, had served as Director of the Utah Experiment Station, 1900-1905; President of the Agricultural College of Utah, 1907-16; President of the International Dry Farming Congress, 1912, and was the author of numerous articles on dry farming and irrigation subjects.

Mr. Dawson was a Denver, Colorado, lawyer who had given much attention to irrigation law and irrigation subjects.

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The Fact Finders' Report led to the enactment of two measures: the Fact Finders' Act of December 5, 1924,⁵⁰ and the Omnibus Adjustment Act of 1926.

The report reflects the same concern and the same objectives that had been voiced by the advocates of the Extension Act of 1914. The necessity of bringing privately held excess lands under effective control was carefully studied. Recommendations were made to strengthen the measures taken in the 1914 Act.

In listing the defaults of the Reclamation Service, the Fact Finders declared that "the greedy owner of private lands, ready to trade upon the natural desire of vigorous, hard-working men, for independent homes, should and could have been squelched."⁵¹

For, indeed, it had developed that the provisions of the 1914 Act had proved to be ineffective.

The reclamation act was subsequently amended to require the holders of more than a homestead unit to sell the surplus.⁵² This amendment is specific in its terms, but attempts on the part of the Reclamation Service to enforce the law have proved fruitless; and it is evident that the amendment is now practically disregarded.⁵³

The Fact Finders observed the development of a system of tenantry on Federal reclamation projects:

The tenant is not desirable on the Federal irrigation projects, for the reason that these projects were authorized with the home-building idea as the central consideration. It was hoped that those who entered upon the projects would do so with the purpose of making permanent homes for themselves and their families. Under a system of tenantry, the farm merely becomes a long-distance investment, the profits from which, if any, are used to maintain the family in the city or at least at considerable distance from the farm.⁵⁴

They noted that the principal activity of the reclamation law had been to improve conditions on private lands, a fact attested to by the 2,041,715 acres of private lands under some form of Federal reclamation development as contrasted with only 513,163 acres of public lands in Federal projects. These facts demonstrated the need, as they saw it, to curb past evils which had developed in connection with large private holdings:

⁵⁰ Sec. 4 of the Second Deficiency Act of 1924, 43 Stat. 701-704.

⁵¹ Sen. Doc. 92, p. xiii.

⁵² The reference is obviously to Section 12 of the 1914 Act.

⁵³ S. Doc. 92, p. 133. See also page 38 of S. Doc. 92: "Although the reclamation service attempted to compel the subdivision of the privately owned land in the units fixed by law, yet the legal enforcement was found difficult; and what was still worse, in many cases the owners of the land capitalized the Government expenditures and the liberality of its terms of repayment by selling the lands to settlers at much higher prices than could otherwise be obtained. The benefits of the Reclamation Act, therefore, went in such cases almost entirely to the speculative owners, and an obligation of paying interest on inflated land prices was imposed on the settler, in addition to his other burdens."

⁵⁴ *Id.* 95-96.

Attention is called to this matter, not to criticize the inclusion of private land, because agricultural results have justified this action, but to point out the need for new legislation that will ensure that desirable social and economic results of the reclamation act shall go to settlers. This means that the act should be amended to prevent the activity of speculators which has marred its operation in the past. Where land was held in large tracts, or where speculators acquired options on large areas, before the projects were settled, it gave an opportunity of inflating the unirrigated value at which the land could be bought before the Government entered the field, to prices based on irrigated values, under the generous terms of the act.

It seems certain that the aid of the Government will be sought in the future to rescue meritorious but distressed private projects, and that the percentage of privately owned land included in Government projects will tend to increase rather than diminish.⁵⁵

After discussing examples of large landholdings in existing Federal projects, the Fact Finders drew this conclusion.

It is evident that the act needs to be amended either by the repeal of the limitation to a single homestead, or by putting teeth in it which will enable it to be enforced.⁵⁶

The teeth recommended by the Fact Finders are found in their summary Recommendation No. 12:

That no reclamation project should hereafter be authorized until all privately owned land in excess of a single homestead unit for each owner shall have been acquired by the United States or by contract placed under control of the Bureau of Reclamation for subdivision and sale to settlers at a price approved by the Secretary. This price to be considered in determining what land and water will cost settlers and hence the feasibility of the project under the payment conditions of the law.⁵⁷

The response of the Congress was, first, the enactment of modified versions of the recommended provision in the Departmental Appro-

⁵⁵ *Id.* 133.

⁵⁶ *Id.* 134.

⁵⁷ *Id.* 4. The Fact Finders carried this recommendation into their proposed legislation as follows:

"* * * That hereafter no moneys shall be expended for construction on account of any such project or division until all areas of land irrigable thereunder and owned by any individual in excess of one hundred and sixty irrigable acres, shall have been conveyed in fee to the United States free of encumbrance to again become a part of the public domain, under a contract between the United States and the individual owner providing that the value as shown by said appraisal of the land so conveyed to the United States shall be credited in reduction of the construction charge thereafter to be assessed against the land retained by such owner; and lands so conveyed to the United States shall be subject to disposition under the reclamation law when so ordered by the Secretary: *And provided further*, That hereafter no moneys shall be expended for construction on account of any such project or division until an appropriate contract in form approved by the Secretary shall have been properly executed by all holders of Federal land grants of more than one hundred and sixty acres irrigable thereunder, which shall provide for the sale of such lands to actual bona fide settlers at not more than the value thereof as shown by said appraisals" (Sec. 3, proposed legislation, S. Doc. 92, p. 205).

This bill was introduced in the House as H.R. 9611 and a modified version of Section 3 was favorably reported by the House Irrigation and Reclamation Committee. See footnote 59.

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priation Acts for fiscal years 1926 and 1927 in regard to certain specific projects⁵⁸ for which funds were being appropriated, and, second, the enactment of a generally applicable modification of the Fact Finders' recommendation as Section 46 of the Adjustment Act of 1926.⁵⁹

⁵⁸ Act of March 3, 1925—Newlands project, Spanish Springs division, Nevada; Vale project, Oregon; Yakima project, Kittitas division, Washington. Act of May 10, 1926—Sun River project, Montana; Owyhee, Vale and Baker projects, Oregon; Newlands project, Spanish Springs division.

⁵⁹ Section 46 was adopted as part of an amendment offered on the floor of the House by Representative Cramton, of Michigan, a member of the Appropriations Committee. In offering it, he stated that it followed the form of the provision that had recently been approved by the House and Senate in the Interior Department Appropriation bill for fiscal year 1927 for the Owyhee, Baker, and Sun River projects. (67 Cong. Rec. 8545.) As proposed by Representative Cramton and adopted by the House, this section, like the legislation proposed by the Fact Finders, was in the form of a prohibition on funds. The Senate Interior Committee substituted the restriction on delivery of water, in which form the bill became law. The committee explained that it made the change only because it thought that contracts could not be successfully negotiated until after the Government had taken some action at least by appropriating funds. It felt that its change in language would amply protect the United States in the desired manner. (S. Rept. 831, 69th Cong.)

The direct connection between Section 12 of the 1914 Extension Act and the legislative recommendation of the Fact Finders is also demonstrated by the following colloquy between Representative Hayden and Mr. Ottamar Hamel, Chief Counsel of the Bureau of Reclamation, during the House Committee hearings on their proposed legislation:

Mr. HAYDEN. Let me ask you just one question. Is there anything later in the law than Section 12 of the extension law which provides that before a contract is made [or] the work begun in the construction of a reclamation project the owners of private lands will agree to dispose of their excess holdings?

Mr. HAMELE. Nothing later on that subject; no.

Mr. HAYDEN. That is the latest provision there is with respect to excess holdings?

Mr. HAMELE. Yes.

* * * * *

Mr. HAYDEN. Then this provision that you have in Section 3 is an amplification and extension of the basic idea of Section 12 of the extension act?

Mr. HAMELE. Exactly. (Hearings before House Committee on Irrigation and Reclamation on H.R. 8836 and H.R. 9611, 68th Cong., 1st sess., pp. 350-351.)

Chairman Campbell of the Fact Finders was present during this colloquy and Mr. Hamel was evidently acting as Mr. Campbell's legal adviser.

The Fact Finders' recommendation was carried into the legislation reported by the House Committee in the following form:

"Sec. 4. That no moneys shall be expended for construction on account of any new project, or any new division of a project, hereafter authorized, until an appropriate repayment contract, in form approved by the Secretary, shall have been properly executed by a district or districts organized under State law, embracing the lands irrigable thereunder, and the execution thereof shall have been confirmed by decree of a court of competent jurisdiction, which contract, among other things, shall contain an appraisal approved by the Secretary, showing the actual bona fide value of all such irrigable lands fixed without reference to the proposed Government development, and all public lands irrigable under any such project or division shall be entered subject to the conditions of this section which shall be applied thereto: *Provided, That no moneys shall be expended for construction on account of any such project or division hereafter authorized until an appropriate contract in form approved by the Secretary shall have been properly executed by all owners of land of more than one hundred and sixty acres irrigable thereunder, which shall provide for the sale of such excess lands at not more than the value thereof as shown by said appraisal. And provided further, That the provisions of this section shall not apply to State lands or Indian lands.*" [Italics supplied. H.R. 9611, 68th Cong., 1st Sess.]

The House bill was dropped in favor of the Senate version and the Senate version (which did not contain section 4) was attached as a rider to the Second Deficiency Appropriation Act, fiscal year 1924 (Act of December 5, 1924; 43 Stat. 701). The recommendation was finally carried out in 1926 by the inclusion of Section 46 in the Omnibus Adjustment Act. That act completed the legislation necessary to give effect to the Fact Finders' report.

Section 46 of the 1926 Act begins with a statement that no water shall be delivered upon the completion of any new project or new division of a project until a contract or contracts shall have been made by the Secretary with an irrigation district or districts organized under State law⁶⁰ providing for payment over not to exceed 40 years of the cost of constructing the works and also providing for payment of operation and maintenance costs, and the execution of such contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. It provides further that:

Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; and that until one-half the construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior and that upon proof of fraudulent representation as to the true consideration involved in such sales the Secretary of the Interior is authorized to cancel the water right attaching to the land involved in such fraudulent sales: *Provided, however, That* if excess land is acquired by foreclosure or other process of law, by conveyance in satisfaction of mortgages, by inheritance, or by devise, water therefor may be furnished temporarily for a period not exceeding five years from the effective date of such acquisition, delivery of water thereafter ceasing until the transfer thereof to a landowner duly qualified to secure water therefor: * * *⁶¹

It is readily observable that the genesis of Section 46 is to be found in Section 12 of the 1914 Act. Consequently, the legislative history of the latter, as well as of the 1926 Act itself, is pertinent to its analysis, *Boone v. Lightner*, 319 U.S. 561; *U.S. v. C.I.O.*, 335 U.S. 106; *U.S. v. Plesha*, 352 U.S. 202. There can be no question that the requirement of Section 46 that the excess landowner contractually agrees to the disposition of excess lands was a condition to receiving project water for such excess lands was deliberately enacted by the Congress in further pursuance of its policy designed to secure the breakup of pre-existing excess holdings benefiting from the expenditure of federal funds and to prevent the owners of such holdings from reaping an unearned profit at the expense of purchasers. It is equally

⁶⁰ Contracting entities are no longer limited to irrigation districts. Section 9(d) of the Reclamation Project Act of 1939 (53 Stat. 1195; 43 U.S.C. 485(d)) authorizes contracts with organizations "satisfactory in form and powers to the Secretary."

⁶¹ The proviso was added by the Act of July 11, 1956 (70 Stat. 524).

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clear that such a policy would be completely frustrated by reading into that requirement of Section 46 any qualifications or limitations based on payout whether in advance or otherwise.

Such a qualification of Section 46 would reduce the relationship between the United States and the irrigation water users to that of debtor and creditor; it would render this provision of the Federal reclamation laws purely and simply a security device; and for the broad objectives of the reclamation program it would substitute merely the concern of a creditor for his loan.

It is precisely this narrow view which the Supreme Court in *Ivanhoe v. McCracken*, 357 U.S. 275, held to be a fundamental misconception. Such had been the view of the California Courts in that case (47 Cal. 2d 597, 306 P. 2d 824). Rather than a limited debtor-creditor policy, the Supreme Court held the true nature of the Federal reclamation policy to be:

* * * one requiring that the benefits therefrom be made available to the largest number of people, consistent, of course, with the public good. This policy has been accomplished by limiting the quantity of land in a single ownership to which project water might be supplied. *Ivanhoe*, loc. cit. p. 292.

Consequently, it is plain that the Cohen opinion was in error in assuming that the Congress had intended to subordinate the recordable contract requirement of Section 46 to the payout qualification King had found in the 1912 Act. The weakness of this opinion lies both in its assumption that King was to be read as holding that payout automatically lifted all excess-land limitations and in its failure to comprehend the significance of Section 12 of the Extension Act. It was in error in assuming that the only substantive modification introduced into the reclamation law regarding excess lands between the time of the King opinion and the 1926 Act was the abandonment of individual water-right applications in favor of the joint liability contract.⁶²

Actually, the addition by the Congress in August of 1914, after the issuance of the King opinion, of the concept embodied in Section 12 of the Extension Act requiring an initial agreement to sell excess lands was a new technique ignored in the 1947 opinion. This concept subsisted along with the individual water-right application system. It was continued and expanded by the Congress when it substituted joint for individual liability. The "substantially different acreage restriction" which the 1947 opinion was unwilling to recognize as arising out of the abandonment by the 1922 and 1926 Acts of individual water-right applications in favor of the joint liability contract had

⁶² The Act of May 15, 1922 (42 Stat. 541), had authorized joint liability contracts in lieu of individual water-right applications. The 1926 act made them mandatory for new projects.

in fact been decreed by the Congress years before in the heyday of the individual water-right application—a fact that the opinion completely overlooked.

It is perhaps worthy of note that the framers of the proposed Kings and Kern contracts now before you themselves apparently assumed that payout did not automatically and as a matter of law necessarily terminate continued applicability of the recordable contract requirement of Section 46. One of the alternative forms of contract, it will be recalled, terminates and releases the recordable contracts *only if payout occurs no later than year ten. Subsequent payout, for example, in the eleventh year, could not effect that result.* And the other form of contract makes cash-on-the-barrelhead the *quid pro quo*. Payout in 181 days rather than 180 would find the door slammed shut. Obviously, the contracts themselves implicitly concede that the Secretary possesses discretion as to whether and to what extent payout shall discharge excess-land limitations.⁶³ Once the existence of such a discretion is conceded, the entire concept that payout and freedom from excess land limitations are inseparable, collapses.

Past Administrative Practice

It will no doubt be contended that the validity of the Kings and Kern contracts is no longer open to question. The ground for such an argument is an alleged long-standing, continuous, and consistent Departmental administrative interpretation of the statutes involved over a period of almost half a century.

In examining the force of this argument, the precise issue posed by the pending contracts should be kept in mind. The issue is not one of coalescence of holdings, that is, at what point of time after initiation of a project lands may be acquired without limitation as to eligibility for project service. The issue is whether the statutory requirements applicable to the breakup of pre-existing holdings are voided or terminated by either lump-sum or early repayment of construction charges.

The statements and actions of the Department, to January of 1956, dealing with payout in relation to excess-land limitations are summarized in Part One of the May 1956 Departmental study entitled "Excess Land Provisions of the Federal Reclamation Laws and the Payment of Charges," hereinafter referred to as the 1956 Study. The pertinent documents are set out in the Appendix to the 1956 Study.

As was once said of a Maeterlinck play, "There is less in this than meets the eye." They do not support the argument.

⁶³ Even if there were discretion as to the recordable contract requirement, the proposed contracts would be a clear abuse because they enable the very group against whom the requirement was directed, i.e., large owners at the time of initiation of project water service, to prevent the limitation from ever becoming operative.

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The largest group of documents set out in the Appendix relate to the Salt River, Yuma, Minidoka, Klamath, and Sun River projects.⁶⁴ They cover a period of years from 1919 to 1938. In no instance were lands involved to which either Section 12 of the 1914 Act or Section 46 of the 1926 Act applied. Most of the situations involved arose under the 1902 and 1912 Acts. The Warren Act was involved in at least one.⁶⁵ All apparently are based upon the King opinion and, for the most part, do not rise above the level of generalizations without specific inquiry into the particular factual and legal situation that might be involved. No question as to compliance with a statutory requirement for breakup of pre-existing holdings was considered. There was in fact no occasion to consider it.

One of the documents, a letter of August 18, 1937,⁶⁶ from the Commissioner of Reclamation to the Superintendent of the Yuma project, reveals that, as late as that date, there had been "*no decisions of the Department or of the courts involving cases where the construction charges were entirely paid up.*" [Italics supplied.] This is hardly a firm foundation upon which to base an assertion that a clear administrative practice actually existed even as to cases arising under Section 3 of the 1912 Act.

In all of the pre-1947 cases cited in the 1956 Study only two can fairly be said to bear any relationship to the issue presented by the Kings and Kern contracts. These are the notices issued in 1939 to holders of irrigable land on the Payette division of the Boise project and similar notices issued about the same time on the Roza division of the Yakima project.⁶⁷

The Payette notice stated that water would not be delivered to an individual landowner unless he showed that he did not own more than 160 irrigable acres of land upon which repayment had not been completed or that his excess lands had been placed under recordable contract "in full compliance with the requirements of the statute and the [repayment] contract."

In requesting Departmental approval of the Payette notice, the Commissioner merely stated that a similar notice had been used on the Roza division of the Yakima project. The correspondence underlying the Roza notice reveals clearly that it was assumed, rather than decided, that application of the 1926 Act was controlled by the King opinion.⁶⁸ As has been demonstrated, such an assumption is without foundation. The Roza and Payette cases, therefore, in themselves lend no support to the Kings and Kern contracts and, of course, standing

⁶⁴ 1956 Study, pp. 20-28; Appendix 4-15, 17-24.

⁶⁵ *Id.*, p. 26; Appendix 18-20.

⁶⁶ 1956 Study, p. 20; Appendix 11.

⁶⁷ *Id.*, pp. 28-29; Appendix 25.

⁶⁸ In a memorandum from the General Supervisor of Operation and Maintenance and District Counsel Stoutemeyer dated April 12, 1939, the Commissioner of Reclamation was informed:

alone as they do, they cannot evidence any long-standing, continuous, administrative construction.⁶⁹

We have to this point considered Departmental statements and actions prior to 1947. The question arises whether Departmental regulations themselves support the Kings and Kern contracts.

The only regulations of general applicability touching upon excess lands are those applying to individual water-right applications (43 CFR 230.65 and 230.80) and public land entries (43 CFR 401.9). Section 230.65⁷⁰ obviously reflects both the King opinion and Section 12 of the 1914 Act. When read together with Section 230.80,⁷¹ it tends more to support the conclusion that the requirement for disposal of pre-existing excess holdings is not affected by payout rather than to support the contrary conclusion. It is not necessary, however, to go that far, for at the very least there is an ambiguity as between the

"The complication as it exists on the Roza division seems to be subject to termination at an early date under the Departmental decision that the 160-acre limit of ownership applies only during the time that the payment of construction charges has not been completed. (See Departmental decision, July 1, 1914, 43 L.D. 339.) The Act of Congress in regard to excess land contracts was passed after the Departmental decision above referred to was in effect and presumably was intended to be governed by that Departmental decision, which was presumed to have been known by Congress."

⁶⁹ The notices apparently contemplated individual payout as being sufficient to relieve the landowner from the recordable contract requirement of Section 46. This position was overruled by Solicitor Bennett in his Kings River opinion (M-36457) of July 10, 1957. Secretary Seaton also rejected such a policy in his July 12, 1957, letter to Mr. Gordon which is quoted *supra*, p. 384.

⁷⁰ Section 230.65 states in pertinent part:

"Lands which have been patented or which were entered before the reclamation withdrawal may obtain the benefit of the reclamation law. * * * A landowner may, however, hold rights to the use of water for more than one tract of patented land in the prescribed neighborhood at one time: *Provided, That the aggregate area of such tracts upon which the construction charge has not been fully paid does not exceed the maximum limit established by the Secretary of the Interior nor the limit of 160 acres fixed by the reclamation law, on which water will be furnished. The Secretary has decided that the area which may be held by any one landowner after the construction charges have been fully paid may exceed 160 acres (43 L.D. 339-341).* Water will not be furnished on a tract of patented land and a tract of unpatented land in the same ownership unless the water charges have been paid in full on one of the tracts. In other words, water will not be furnished on a tract of private land, regardless of the area, and a tract of unpatented land in the same ownership at the same time unless all water charges on one of the tracts have been paid in full. A landowner who has made contract for the use of water in connection with 160 acres of irrigable land and sold the same, together with the water right, can make other and successive contracts for other irrigable lands owned or acquired by him. *Holders of more than 160 acres of irrigable land, or more than the limit of area per single ownership of private land as fixed by the Secretary of the Interior, for which water may be purchased within the reclamation project, if such a limit has been fixed, must sell or dispose of all in excess of that area before water-right application will be accepted from such holders. (See § 230.80.) If the holder of a greater area desires, he can subscribe for stock in the local water users' association (if there be one), for his entire holdings, executing a trust deed, giving the association power to ultimately sell the excess area to actual settlers who are qualified to comply with the reclamation law, unless the land has been sold by the owner when the Government is ready to furnish water thereon, or provide for the disposal of such excess holdings in some manner approved by an authorized officer of the Department of the Interior.*" [Italics supplied.]

⁷¹ Section 230.80 states in pertinent part:

"The application must cover all the irrigable land of the applicant in the project. (See § 230.65.) If the applicant owns more than the limit of irrigable area fixed for land in private ownership, he must make disposition of all the irrigable lands not covered by his application, as indicated in § 230.65, before the application is accepted."

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reference to payout and the provision regarding disposition of pre-existing excess lands.⁷²

Section 401.9, as is apparent from its text, also is based upon Section 3 of the 1912 Act and the King opinion. Nothing in it indicates that it was to be considered as displacing or rendering nugatory Section 12 of the 1914 Act. I cannot, therefore, regard this section as shedding light upon the problem before me.

Commissioner Straus, who repeatedly urged lump-sum payout as the solution to the excess-land situation in the Kings and Kern River areas, regarded that policy not as one of long standing but as springing from the Associate Solicitor's opinion of 1947. Said the Commissioner in a memorandum to Secretary Chapman, dated January 18, 1952, in which he recommended negotiation with the Kings River interests on the basis of lump-sum payout:

There are two bits of formalized and established Departmental policy, as well as law and legal interpretations, through which certain applications of the Reclamation law may be mitigated. One is the so-called "recordable contract" procedure, written into law and recognized by the Department and widely practiced, whereby excess holders may enjoy use of federal irrigation waters if they file a recordable contract permitting the Secretary of the Interior to sell their excess land under certain conditions. The other is the so-called "lump-sum payment" procedure which is the one that probably will be sought by the Kings River water users should they make any firm agreement for any payment for the conservation water stored in the Army Pine Flat Dam. No such agreement has been reached, and it is the hope of the water users to get this conservation water for free without any repayment and outside of all the Reclamation law, including the 160-acre clause.

The Department of the Interior formalized its policy on the "lump-sum settlement" procedure back on October 22, 1947. The vehicle of the Department in enunciating its policy was Associate Solicitor's Opinion M-35004, approved by the Secretary of the Interior, and thereby entrenched as policy until modified.

And in the same memorandum, Commissioner Straus also stated:

Nevertheless, the theory would on the record appear to have become established Departmental policy primarily by virtue of Associate Solicitor's Opinion M-35004, followed by various other applications resulting from that Opinion. Therefore, at your discretion positive action would be required by the Department to modify the policy.

Following the change in Administrations, Commissioner Straus in a "Memorandum for the Record" dated February 6, 1953, stated that " * * * a policy of accepting 'lump sum' repayment for Reclamation investments resting upon a Solicitor's Opinion was adopted in 1947. Re-examination of this policy became intensive in 1951 and

⁷² It is of interest to note that even the reference in Section 230.65 to the King opinion (43 L.D. 339-341) is couched in terms which emphasize it as a statement of policy rather than as a statement of explicit statutory requirement. Note that it is introduced by the phrase, "The Secretary has decided." Note also that as was King's holding, it is in terms of permissive "may," not in terms of a necessary requirement. The regulation, therefore, strongly supports the conclusion I have reached as to the effect to be given to the King opinion and Section 3 of the 1912 Act.

1952 during a time in which it had been widely adopted as Interior and Reclamation practice."

In a memorandum to Secretary McKay dated February 4, 1953, on the subject, "Excess-land limitations and accelerated payment or prepayment of construction charges," the Commissioner observed:

This all involves a policy of accepting lump-sum repayments when offered by local bodies for Reclamation construction. This is the policy, resting on a Solicitor's opinion, recognized since 1947 by the Department of the Interior with Secretarial approval, and quite recently incorporated in various repayment contracts signed by the Secretary of the Interior. It is a controversial policy question, unresolved, which I believe only can be resolved by the Secretary of the Interior * * *.

Secretary McKay likewise regarded the 1947 opinion as the genesis of the concept that lump-sum or accelerated repayment could toll the recordable contract requirement of Section 46. A letter from the Secretary to Senator Murray dated December 11, 1954, concluded with the comment that, "Up to the present time we have not seen fit to change the policy that was established in 1947 and are continuing to operate the Department under the terms of the 1947 ruling by the Associate Solicitor."

Of particular interest in this connection are Secretary McKay's observations in a letter of March 2, 1954, to then Representative (now Senator) Engle:

In view of the period of time that has elapsed since the ruling mentioned above and the actions that have been taken directly or indirectly in reliance upon it, it is my view that the Department is constrained to follow the precedents already set, unless they should clearly be demonstrated to be wrong or unless the law is changed.

Secretary McKay, therefore, even though he had authorized negotiations on that basis, recognized that the principle could not stand if "clearly demonstrated to be wrong."

There were a number of repayment contracts executed subsequent to Administrative Letter 303 * between 1949 and 1955 which provided that the excess-land limitations will no longer be applicable upon payout. These are the instances to which Commissioner Straus referred when he said that the practice had been "widely adopted." As a matter of fact, they affect only a relatively small portion of all reclamation projects. The language used in these contracts comprehended both the total construction charges and the construction charges upon particular lands for which full payment might be made. Insofar as they relate to the latter, Solicitor Bennett in his opinion of July 10, 1957 (M-36457), had held such a practice to be beyond the Secretary's authority.

*Dated December 16, 1947, by which field offices of the Bureau of Reclamation were advised of the Associate Solicitor's opinion and instructed to proceed on the basis thereof.

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While not all of these contracts involved the recordable contract requirement of Section 46 of the 1926 Act, a number do. The contracts are tabulated and discussed at pages 49-54 of the 1956 Study. Of them the 1956 Study states:

Concerning all of the contracts listed, including the Palisades contracts previously referred to on page 393 (and see Appendix 45), it would appear reasonable to conclude that specific language recognizing the legal effect of the payment of construction charges was included, in the negotiation of the contracts, because of the emphasis on the point resulting from the Landownership Survey of 1946 and Administrative Letter No. 303 with the Associate Solicitor's opinion. All of the contracts cited were negotiated subsequent to the issuance of those two documents. (p. 402)

These contracts are not, therefore, evidence of a longstanding continuous practice but, on the contrary, are to be attributed to the relatively recent 1947 opinion.⁷³

The foregoing demonstrates that:

1. The Departmental actions and statements preceding 1947 almost entirely involved cases in which neither Section 12 of the 1914 Act nor Section 46 of the 1926 Act applied. They did not go to the issue of the effect of prepayment or early payment of construction charges upon the statutory obligation to dispose of pre-existing holdings.

2. In the only instances, pre-1947, which related to recordable contracts, the applicability of the King opinion and Section 3 of the 1912 Act was assumed.

3. Departmental Regulations are, to say the least, ambiguous.

4. The real genesis of the proposal to toll Section 46 by lump-sum or early payout as proposed in the Kings and Kern contracts was the Associate Solicitor's opinion of 1947 and Administrative Letter 303.

Secretary Chapman, as the 1956 Study shows, repeatedly stated that he would not follow the policy. While Secretary McKay authorized negotiations with the Kings River interests on that basis, he left office without executing the contract and, as has been shown, conceded that the policy could not stand if clearly wrong.

Secretary Seaton, in 1957,⁷⁴ repudiated that part of the policy which would have permitted release by individual, rather than dis-

⁷³ In a similar category are individual recordable contracts entered into with some excess landowners on older projects as a part of the compliance program initiated under Administrative Letter 303. It was held in Opinion M-34999 (October 22, 1947) that on older projects where enforcement had been lax, such contracts came within the general authority of the Secretary to implement the reclamation laws even though Section 46 of the 1926 Act was not applicable. The provision respecting the effect of individual payout was, in effect, held invalid by Solicitor Bennett's opinion of July 10, 1957 (M-36457).

⁷⁴ See the Secretary's letter to Mr. Gordon of July 12, 1957, quoted in part, *supra*, p. 402. See also opinion M-36457, July 10, 1957.

strict, repayment. As to the latter, while he reaffirmed his support of the principle, Secretary Seaton in the end felt there was sufficient doubt to require further legal review.

I do not believe the mantle of antiquity can yet be placed upon the remains of a policy which for all practical purposes was not developed until after 1947; which within a year or two, as soon as its implications were realized, became the subject of heated and continuing controversy within as well as without the Department; which was repudiated in part by the Secretary of the Interior in 1957; which your two immediate predecessors could have applied but found reason not to, and a policy, moreover, which Secretary Chapman, to whom the Kings agreements were first proposed, pointedly refused to approve.

The Supreme Court has made clear the limitations of the administrative practice rule. The rule is properly invoked only if the practice relied upon actually embraced the problem under consideration. *Estate of Sanford v. Collector of Internal Revenue*, 308 U.S. 39; *United States v. Missouri Pacific Railroad Company*, 278 U.S. 269. See also *Order of Railway Conductors v. Swan*, 329 U.S. 520. Here, as has been shown, the issue involved in the Kings and Kern contracts was not the issue to which most of the Departmental statements and actions were addressed from the time of the King opinion to 1947. And, as the Commissioner of Reclamation observed in 1937, up to that time "there had been no decisions of the Department * * * involving cases where the construction charges were entirely paid up."

In two recent cases, *Baltimore and Ohio Railway Co. v. Jackson*, 353 U.S. 325, and *United States v. DuPont & Co.*, 353 U.S. 586, the Court looked behind administrative positions of more than 60 and 40 years duration, respectively, and arrived at its own conclusions as to the meaning of the statutes involved. In each case the Court emphasized the fact that the agencies had not actually ruled on the question before the Court.

An ambiguous regulation cannot be relied upon as an administrative interpretation. *Estate of Sanford v. Collector of Internal Revenue*, 308 U.S. 39.

The application of the rule should be restricted to cases in which the construction involved is really one of doubt and where those to be affected have relied on the practical construction.⁷⁵ *Studebaker v. Perry*, 184 U.S. 258. In other words, administrative practice, no matter of how long standing, is not controlling when it is clearly erroneous. Antiquity is not a preservative of error. *United States v. Graham*, 110 U.S. 219; *Swift Company v. United States*, 105 U.S. 691;

⁷⁵ There is no contention that the large landholdings in the Kings and Kern River areas developed in reliance upon the purported Departmental policy. To the contrary, as is well known, both the Kings and Kern interests bitterly opposed application of Reclamation law in the authorization of the Pine Flat and Isabella projects. See 41 Op. Atty. Gen. 66.

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Merritt v. Cameron, 137 U.S. 542; *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275; *Burnet v. Chicago Portrait Co.*, 285 U.S. 1; *Webster v. Luther*, 163 U.S. 331; *County of Marin v. United States*, 356 U.S. 412.

Particularly relevant are the observations of the court in the two cases last cited. Said the court in *Webster*, "But this court has often said that it will not permit the practice of an Executive Department to defeat the obvious purpose of a statute." (163 U.S. 331, 342). Accord—*United States v. City of San Francisco*, 310 U.S. 16, 31–32. And in *County of Marin v. United States* (356 U.S. 412, 420):

While the interpretation given a statute by those charged with its application and enforcement is entitled to considerable weight, it hardly is conclusive. *United States v. Missouri Pac. R. Co.*, 278 U.S. 269, 280 (1929). The Commission practice as evidenced by these cases is, in our opinion, insufficient to outweigh the apparent Congressional purpose and the clear language of the statute.

That the clear Congressional purpose of the Congress in enacting both Section 12 of the 1914 Act and Section 46 of the 1926 Act was, as their terms unequivocally state, to require the breakup of pre-existing excess holdings has been demonstrated.

Even if a long-standing Departmental practice of actually waiving the application of Section 12 of the 1914 Act or Section 46 of the 1926 Act in the event of lump-sum or accelerated payout could be shown to have existed (which, of course, is not the case) such a practice indulged in without any real examination of its validity would not shield it from reconsideration and reversal if found to be unsupportable. *United States v. Healey*, 160 U.S. 136.

In *Healey*, the question was whether \$1.25 or \$2.50 per acre was the proper charge for the issuance of a patent under the Desert Land Act of March 3, 1877 (19 Stat. 377) where the lands embraced in a desert land entry were within the alternate sections of public lands reserved by the United States along the lines of land-grant railroads.

Upon passage of the Desert Land Act in 1877 instructions as to administering the Act had been issued by the General Land Office to its field offices. These instructions specified *inter alia* that the price to be paid by entrymen was \$1.25 per acre. No distinction was made in the instructions as between reserved railroad lands and any other lands to which the Desert Land Act applied. The Desert Land Act itself specified only payment of \$1.25 per acre.

For 10 years after passage of the Act the Department uniformly held that lands entered under the Desert Land Act should be paid for at the rate of \$1.25 per acre without regard to railroad limits.

It was not until 1887 that the question of whether the \$1.25-per-acre fee was proper for lands within a railroad grant was actually examined in the Department. Upon that examination the General Land Office

reversed itself and issued a new circular specifying the \$2.50 price for such lands. See 5 L.D. 708. The reason for the change in position was the conclusion that the Department's prior practice had overlooked R.S. 2357 which specified a price of \$2.50 per acre for patents for reserved railroad lands. It was reasoned that to read the Desert Land Act as impliedly repealing R.S. 2357 would be to defeat specific Congressional policy as to reserved railroad lands. See 8 L.D. 368.

Healey, who had entered reserved railroad lands, and having been charged \$2.50 per acre under the new instructions, sued to recover the difference of \$1.25 per acre and the Court of Claims held in his favor.

In support of the Court of Claims judgment, Healey sought to invoke the rule that "When the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the Department charged with its execution, where that construction has, for many years, controlled the conduct of the public business." *United States v. Healey* (160 U.S. 141).

The Supreme Court, however, held that the rule could not properly be invoked because the Interior Department itself had examined into the soundness of its prior practice and had discarded it. The Court, therefore, regarded itself as free to make its own interpretation of the Desert Land Act. The Court stated, in this regard:

If * * * the Interior Department had uniformly interpreted the act of 1877 as reducing the price of alternate reserved sections of land along the lines of land-grant railroads, being desert lands, from \$2.50 to \$1.25 per acre, we should accept that interpretation as the true one, if, upon examining the statute, we found its meaning to be at all doubtful or obscure. But as the practice of the Department has not been uniform, we deem it our duty to determine the true interpretation of the act of 1877, without reference to the practice in the Department. (See 160 U.S. 136, 145)

The Court thereupon, in its interpretation, reached the same conclusion that the Department had reached in 1887 and, accordingly, held that the proper charge was \$2.50 per acre.

Obviously, in so holding, the Court considered that the Department had not itself been precluded from examining into the soundness of its own prior holding.

Healey alone dispels any question as to the authority of the Department at this date to examine into the soundness of the legal underpinning of the Kings and Kern contracts.

To summarize:

Payout is not relevant to the recordable contract requirement of Section 46 of the 1926 Act. Section 3 of the 1912 Act as well as Sections 5 and 3 of the 1902 Act remain viable under the joint liability contract system, but they, and payout, are relevant to application of excess land questions not governed by the recordable contract requirements, i.e., the subsequent acquisition of lands—situa-

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tions which for convenience I have described by the general reference "coalescence of holdings."

Further, in the latter situation, the decision in any given case turns upon the considerations discussed above at pages 384. The pertinent question here may be summarized as "When payout occurs, has a general pattern of family-sized ownerships been established?" If it has, then the release from further limitation would be within Secretarial discretion. Ordinarily, this would not be the case if payout occurs in the earlier years of a project. Conversely, and assuming faithful administration and observance of the recordable contracts and the excess-land limitations generally in the interim, it is to be expected that in later years, as for example, after the usual 40-year payout period for a repayment contract, conditions would be such as to permit of such a determination compatibly with the underlying objectives of the reclamation law.⁷⁶

Therefore, it is my opinion that the contracts now pending in the Department for approval and signature by you must be rejected.

FRANK J. BARRY, *The Solicitor*.

APPENDIX A

July 1, 1914.

The Secretary of the Interior,
Washington, D.C.

Sir:

The project managers of the Reclamation Service have requested an interpretation of the meaning of the proviso of section 3 of the act of August 9, 1912 (37 Stat. 265), which reads as follows:

Provided, That no person shall at any one time or in any manner, except as hereinafter otherwise provided, acquire, own, or hold irrigable land for which entry or water right application shall have been made under the said reclamation Act of June seventeenth, nineteen hundred and two, and Acts supplementary thereto and amendatory thereof, before final payment in full of all instalments of building and betterment charges shall have been made on account of such land in excess of one farm unit as fixed by the Secretary of the Interior as the limit of area per entry of public land or per single ownership of private land for which a water right may be purchased respectively, nor in any case in excess of one hundred and sixty acres, nor shall water be furnished under said Acts nor a water right sold or recognized for such excess; but any such excess land acquired at any time in good faith by descent, by will, or by foreclosure

⁷⁶ Questions of handling the coalescence situation in relation to payout in practice have not received extensive consideration. They are complex and it might be well for this subject to be given careful study to see whether the development of overall guidelines might be warranted.

of any lien may be held for two years and no longer after its acquisition; and every excess holding prohibited as aforesaid shall be forfeited to the United States by proceedings instituted by the Attorney General for that purpose in any court of competent jurisdiction; and this proviso shall be recited in every patent and water-right certificate issued by the United States under the provisions of this Act.

This proviso has been the subject of decision by the Department in two cases, namely, that of Amaziah Johnson (42 L.D. 542) and Keebaugh and Cook (42 L.D. 543).

In the Johnson case the Department decided that as his farm unit contained 69.95 acres of irrigable land he was qualified to purchase the land of his neighbor containing 56 acres of irrigable land, provided all installments on account of the water right contracted for in connection with the tract purchased shall have been paid in full.

In the Keebaugh and Cook case the decision was substantially to the same effect, namely, that Keebaugh having a farm unit of 104 acres of irrigable land and Cook having a farm unit of 77 acres of irrigable land they could not file water right applications for another tract of 78 acres of irrigable land owned by them jointly, no offer being made to pay the charges in full upon the land held by them. These cases plainly decide one feature covered by this proviso, namely, that one having a water right application for a farm unit on which payments are due could not acquire another tract of land and secure water therefor unless payments in full were made for water right for the additional tract. In other words, that a person may hold a water right for but one tract for which he has a water right application not paid in full, either a single farm unit or a tract not exceeding the limit of acreage for land in private ownership as fixed for the project.

Thus far there seems to be no difficulty in determining the meaning of the proviso, but some expressions in the departmental decisions lead to the inference that a person holding a tract upon which payment has not been made in full may not purchase paid-up water rights for more than 160 acres.

This seems to be based upon the construction placed upon the following portion of the proviso, "nor in any case in excess of 160 acres, nor shall water be furnished under said acts nor water right sold or recognized for such excess." If this expression is construed as applying to the lands for which water right has been paid in full it has the effect of a provision by Congress limiting water rights for private land holdings, after full payment, to water rights for 160 acres. In other words, it is a provision which limits to 160 acres the area for which a man may hold an appurtenant water right even after he has discharged all his obligations to the Government, except for operation and maintenance. Such a limitation is a radical departure from all the public land laws, as apparently there never has been any intent

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by Congress to limit the amount of land which a man may own after having complied in full with the provisions of the law in order to acquire the title, and as the water right becomes on final payment an appurtenance to the land the same rule governs.

It would seem that a construction of a statute constituting so wide a departure from the previous conditions regarding the rights of individuals should not be adopted in the absence of a plain intent expressed in the law, as it would not only render the law subject to question on the ground of constitutionality, but would also introduce an entirely new system of land ownership in reclamation projects not applicable to any other public lands or any other lands acquired from the United States.

On the other hand, there is a rational interpretation of this language that is in full harmony with prior legislation and the evident intent of the reclamation law, namely, that a person who holds a farm unit shall not be permitted, before full payment has been made on the appurtenant water right, to acquire other lands with appurtenant water rights unless the water right charges on the latter have been fully paid; similarly that a person may hold private lands with appurtenant water rights up to the limit of single ownership fixed for the project in one or more parcels before full payment of the water right charge, but may not acquire other lands with appurtenant water rights unless the water right charges thereon have been paid in full. Furthermore, that the limit of area of the farm units and of single private land holdings to which water rights are appurtenant (and as to which water right has not been paid in full) shall in no case exceed 160 acres.

I deem the language of the proviso to be fully in accord with an intent on the part of Congress to make such a rule as to the area held in a farm unit or by single ownership under an uncompleted water right application.

It is therefore recommended that the proviso be construed as suggested and that it will accordingly permit the furnishing of water for land on which payment in full has been made of building and betterment charges even when more than 160 acres of such land is owned by one person, provided the annual charges for operation and maintenance are paid and all other requirements are complied with.

Very truly yours,

WILL R. KING, *Chief Counsel.*
RECLAMATION SERVICE

APPROVED JULY 22, 1914.

A. A. JONES, *First Assistant Secretary.*

APPENDIX B

October 22, 1947

TO THE COMMISSIONER, BUREAU OF RECLAMATION

Subject: Program of the Bureau for action consistent with the acreage limitations of the Federal reclamation laws.

Your memorandum of September 19, 1947, requested my opinion on two questions, one of which I have answered in M-34999, and the other of which is as follows:

Does the payment in full of construction charges against "excess lands" free such lands of the acreage limitations of the reclamation laws in the case of (a) lands covered by water-right applications; (b) lands receiving water under joint liability contracts entered into by irrigation districts or similar organizations; and (c) lands receiving water by the operation of contracts under the Warren Act?

As to part (a) of your question, pertinent references are to Section 3 of the Act of August 9, 1912 (37 Stat. 265, 266), and to instructions approved by the Department on July 22, 1914 (43 L.D. 339). The 1912 act provides generally concerning patents on reclamation entries, section 3 dealing with the release of liens and containing the following proviso:

* * * *Provided*, That no person shall at any one time or in any manner, except as hereinafter otherwise provided, acquire, own, or hold irrigable land for which entry or water-right application shall have been made under the said reclamation Act of June seventeenth, nineteen hundred and two, and Acts supplementary thereto and amendatory thereof, before final payment in full of all instalments of building and betterment charges shall have been made on account of such land in excess of one farm unit as fixed by the Secretary of the Interior as the limit of area per entry of public land or per single ownership of private land for which a water right may be purchased respectively, nor in any case in excess of one hundred and sixty acres, nor shall water be furnished under said Acts nor a water right sold or recognized for such excess; but any such excess land acquired at any time in good faith by descent, by will, or by foreclosure of any lien may be held for two years and no longer after its acquisition; and every excess holding prohibited as aforesaid shall be forfeited to the United States by proceedings instituted by the Attorney General for that purpose in any court of competent jurisdiction; and this proviso shall be recited in every patent and water-right certificate issued by the United States under the provisions of this Act.

In the instructions referred to, this proviso was construed to provide that lands as to which full payment had been made on the appurtenant water right are not to be included within the area permitted to be held under water-right application or within the limit for which water may be delivered. Thus it follows as stated in your question, that payment in full of the charges under a water-right application, except operation and maintenance charges, removes the lands for which the water right is acquired from the operation of the acreage restrictions.

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In answering part (b) of your question, reliance is again placed on section 3 of the 1912 act, *supra*. While that enactment speaks of final payment in full of "building and betterment charges" on excess lands in the case of "entry or water-right application," for reasons herein-after stated it must be construed to apply also to the full payment of the construction obligation assumed under a joint liability contract executed by an irrigation district or similar organization.

In the Solicitor's Opinion (M-33902), dated May 31, 1945, regarding the applicability of the excess-land provisions to the Coachella Valley County Water District lands, there appears the following:

The Federal reclamation law is contained in the Reclamation Act of June 17, 1902 (32 Stat. 388), which, together with acts amendatory and supplementary thereto, forms a complete legislative pattern in the field. The Supreme Court describes this type of legislation succinctly in *United States v. Barnes*, 222 U.S. 513 (1912) at page 520:

Much of our national legislation is embodied in codes, or systematic collections of general rules, each dealing in a comprehensive way with some general subject, such as the customs, internal revenue, public lands, Indians, and patents for inventions; and it is the settled rule of decision in this court that where there is subsequent legislation upon such a subject it carries with it an implication that the general rules are not superseded, but are to be applied in its enforcement, *save as the contrary clearly appears* * * * [Italics supplied]

Congress has followed precisely this type of legislative policy in enacting the Federal reclamation law.

The principal legislative provisions of general applicability dealing with acreage limitations are found in the Act of June 17, 1902 (32 Stat. 388); the Warren Act, February 21, 1911 (36 Stat. 925); the Act of August 9, 1912 (37 Stat. 265); the Reclamation Extension Act, August 13, 1914 (38 Stat. 686); and section 46, the Omnibus Adjustment Act, May 25, 1926 (44 Stat. 636, 649). The several excess-land provisions are to be read together and treated as component parts of a comprehensive legislative plan of limitations applicable to lands receiving water from Federal reclamation projects.

The pertinent portion of section 46 of the 1926 act, *supra*, reads as follows:

No water shall be delivered upon the completion of any new project or new division of a project until a contract * * * in form approved by the Secretary of the Interior shall have been made with an irrigation district, * * *. Such contract * * * shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; and that until one-half the construction

charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior and that upon proof of fraudulent representation as to the true consideration involved in such sales the Secretary of the Interior is authorized to cancel the water right attached to the land involved in such fraudulent sales; * * *.

The specific question is whether the release of the limitation by section 3 of the 1912 act upon "final payment in full of all installments of building and betterment charges" on account of "irrigable land for which entry or water-right application shall have been made" can be held to apply to the payment in full of the joint obligation assumed by an irrigation district under a contract entered into as required by section 46 of the 1926 act.

In construing an ambiguous enactment, it is held proper to consider acts passed at prior and subsequent sessions to which the act does not refer. Section 5202, Sutherland Statutory Construction (3d Edition, Horack), *Vane v. Newcomb*, 132 U.S. 220, 235; *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41; *Tiger v. Western Investments*, 221 U.S. 286, 309; *Joy Floral Co. v. Commissioner of Internal Revenue*, 29 F. 2d 865; *United States v. Fixico*, 115 F. 2d 389. Also see *Swigart v. Baker*, 229 U.S. 187. In Opinion M-21709, the Solicitor ruled that the proviso to Section 1 of the Warren Act of February 21, 1911, quoted in paragraph 2 thereof, made the land-limitation provisions of Section 5 of the 1902 Act applicable to contract executed pursuant to said Section 1 of the Warren Act. With reference to the excess-land provisions of Section 2 of the Warren Act, which were susceptible of the construction that the limitation therein set out related to the quantity of water deliverable thereunder, the Solicitor demonstrated that such a limitation would be contrary to the statutory provisions contained in the Acts of June 17, 1902, and August 9, 1912, which imposed a limitation on the area for which water might be supplied; he concluded that Congress, in enacting the Warren Act, did not intend to adopt a limitation radically different from the one contained in other reclamation laws. It is significant that the Solicitor, in construing the Warren Act, placed reliance on provisions of the subsequently adopted Act of August 9, 1912.

In Opinion M-33902, *supra*, the Solicitor ruled that the doctrines of *ejusdem generis* and *expressio unius est exclusio alterius* should not be applied where a contrary intention of the lawmaker is apparent. It seems clear that the various excess-land enactments were intended by Congress to provide a uniform and comprehensive procedure for the implementation of its land-limitation policy.

Section 46 of the 1926 act, *supra*, sets out the substance of the provisions required to be incorporated in joint-liability repayment contracts with irrigation districts. That section does not purport to

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contain all the excess-land provisions applicable to lands affected by such contracts. For instance, it contains no provisions relative to cases where excess holdings develop subsequent to the execution of the joint-liability contract, either by descent, will, or foreclosure of a lien, or by other methods of acquisition. The proviso to Section 3 of the Act of August 9, 1912, does, however, contain provisions applicable to such cases. Consistently with the Solicitor's above-mentioned opinions, Section 46 may be construed as constituting merely one element of a comprehensive land-limitation plan. Since joint-liability repayment contracts were not in general use when the Act of August 9, 1912, was adopted, the language used in those acts was not specifically directed at situations arising under contracts of that type. Congress apparently intended that the land-limitation provisions, in effect when the Act of May 15, 1922 (42 Stat. 541), the Act of May 25, 1926, and other acts covering the use of irrigation district contracts were adopted, would be applicable thereto, as nearly as practicable. Otherwise, substantially different acreage restrictions might result from the discontinuance of water-right applications and the adoption of the joint-liability repayment contract procedures.

When all construction costs due under a joint-liability repayment contract have been paid in full, there is no apparent reason why the lands receiving water under such contract should not be deemed relieved of the excess-land restrictions in the same manner as paid-up water right application lands. The fact that Congress did not, in connection with the various acts authorizing or requiring joint-liability repayment contracts, enact complete excess-land provisions couched in language adapted to joint-liability contracts does not in itself deny a Congressional intention that the principles of its excess-land policy, as previously expressed with reference to water-right applications, should apply to such contracts. The enactment of new excess-land provisions, relative to the phases not specifically covered by the said acts, was undoubtedly deemed unnecessary because these acts became a part of the reclamation laws for all purposes and would be interpreted on that basis. The existing excess-land provisions would, therefore, become applicable.

In the light of the foregoing, it is my view that upon full payment of construction obligation under a joint-liability repayment contract, the lands receiving water under such contract are, under the provisions contained in Section 3 of the Act of August 9, 1912, relieved of the statutory excess-land restrictions. It should be noted here that, where the alternative type of contract authorized by section 9(e) of the Act of August 4, 1939 (53 Stat. 1187), is employed, namely, a contract "to furnish water" for a period of years in lieu of a contract for the repayment of a construction obligation, there is no construc-

tion-charge obligation to be paid and, therefore, no release of excess lands from the limitation is operative.

As to part (c) of your question, there is no indication that Congress intended to distinguish between Warren Act lands and project lands to the extent that lands on which a Warren Act contractor has paid all construction charges would remain subject to the excess-land provisions, while project lands on which construction charges have been paid in full would be relieved from such restrictions; neither is there any apparent basis for a distinction of this nature. In the instructions, approved by the Department on July 22, 1914, discussed above, it is stated that if the proviso to Section 3 of the Act of August 9, 1912, were interpreted as a "provision which limits to 160 acres the area for which a man may hold an appurtenant water right even after he has disclosed all his obligations to the Government, except for operation and maintenance," the resulting limitation would be a "radical departure from all the public land laws, as apparently there never has been any intent by Congress to limit the amount of land which a man may own after having complied in full with the provisions of the law in order to acquire the title, and as the water right becomes on final payment an appurtenance to the land the same rule governs." Consistently therewith, where a water right is acquired by full payment of the construction charges due under a Warren Act contract, the lands to which the right is appurtenant are to be deemed relieved from the excess-land provisions. In a Warren Act contract wherein the contractor is called upon to pay only an annual carriage charge, however, there would not be operative the condition which would remove the limitation.

(Sgd.) FELIX S. COHEN, *Associate Solicitor*.

AGREEMENT WITH STATE OF CALIFORNIA FOR CONSTRUCTION OF SAN LUIS UNIT, CENTRAL VALLEY PROJECT

Words and Phrases—Statutory Construction: Generally

The phrase "San Luis Unit," as used in Section 1 of the Act of June 3, 1960 (74 Stat. 156), does not include any lands outside the Federal San Luis unit service area. The phrase does not embrace the State service area. The provisions of Section 1 of the foregoing Act, requiring the application of reclamation law to the "San Luis Unit," requires application of reclamation law only to the Federal San Luis unit service area.

Statutory Construction: Legislative History

The common denominator of legislative intent regarding the San Luis legislation can be derived from the debates. First, Congress, in the enactment of the 1960 Act, intended that no benefits were to be conferred on the State service area by Federal investments without carrying the burdens of Federal law. Second, Congress intended no encroachment on the right

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of the State to develop its own resources, unless Federal interests could not be otherwise protected.

Bureau of Reclamation: Warren Act

Section 2 of the Warren Act, standing alone, requires the application of acreage limitations where the United States cooperates with an entity in the construction of irrigation facilities even where no Federal subsidy is extended to the lands served by such non-Federal entity.

Statutory Construction: Legislative History—Bureau of Reclamation: Warren Act—Bureau of Reclamation: Excess Lands

Congress, in enacting the San Luis legislation, did not intend to apply Section 2 of the Warren Act to the State service area because the national reclamation policy, which Congress implemented in the San Luis Act, is that the acreage limitation follows Federal investment.

State Laws

Where Federal reclamation policy is not imperiled it will not be presumed that a Federal statute was intended to supersede the exercise of the power of a State unless there is a clear manifestation of an intent to do so.

M-36635

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TO THE SECRETARY OF THE INTERIOR

There is now pending in the Department a proposed agreement with the State of California for the construction and operation of the San Luis unit of the Central Valley project in California. The agreement has been drafted pursuant to the provisions of the San Luis Act of June 3, 1960 (74 Stat. 156). In my opinion the draft conforms to law and may be signed by you on behalf of the United States.

The agreement makes no provision for the application of the excess-land provisions of Federal reclamation laws to areas serviced by the State outside the Federal San Luis unit service area.

In my opinion of even date, subject "Excess land limitations, Kings and Kern River Projects," I concluded that accelerated repayment of the cost of construction cannot relieve excess landowners of the recordable contract requirement of Section 46 of the Omnibus Adjustment Act of May 25, 1926, as amended. The issue under the San Luis agreement is whether, in view of the San Luis Act, the requirements of reclamation law apply to the State service area. I have reached the conclusion that they do not.

In the debates and hearings on the San Luis bills (S. 44 and H.R. 7155, 86th Cong.), it was reported that both California and the United States wanted a reservoir in the San Luis area but that only one reservoir site was available. Evidence indicated that the only way the requirements of both sovereigns could be satisfied was by joint use of the only available site. The San Luis Act of 1960 is therefore

unusual in respect to its provision for the construction by the United States of joint-use facilities, the funds being supplied partly by the United States and partly by California. The joint-use facilities, of course, must be adequate to accommodate the needs of both the State and the United States.

If the joint project is built, water from the reservoir will be released and will flow southward to provide irrigation for the Federal service area and other water will be conducted through many of the same facilities to be delivered to the State service area and to Los Angeles and other cities.

Section 1 provides alternatives with respect to construction of the facilities. If the State agrees initially to share in financing of structures sufficiently large to serve both State and Federal needs, the Secretary must build the joint-use facilities to such capacity. If no such agreement is made, the Secretary is directed, nevertheless, to build the dam and reservoir "* * * so as to permit future expansion."

The State is prepared to execute the proposed agreement in accordance with the first alternative. Under the terms of the agreement, the San Luis Reservoir will be constructed with a storage capacity of 2,100,000 acre-feet. The State will have the right to use 1,100,000 acre-feet of this capacity and the Federal Government 1,000,000 acre-feet. The costs of construction will be borne 55 percent by the State and 45 percent by the United States. The State will advance its share of construction costs on a monthly basis over the term of the construction period. The water which will be stored and transported in the State's allocated capacities will be carried to the San Luis unit by State facilities constructed as part of the State Feather River and delta diversion projects.

The question of applicability of Federal acreage limitation laws to the State's use of waters impounded, stored, and carried in the San Luis unit first arises from the provision in Section 1 that:

In constructing, operating, and maintaining the San Luis Unit, the Secretary shall be governed by the Federal reclamation laws (Act of June 17, 1902 [32 Stat. 388], and Acts amendatory thereof or supplementary thereto).

The bill as originally introduced in the House and Senate made no specific reference to the subject.¹ In both the Senate and House Interior Committees, however, additional language was added (Sec. 6(a) in S. 44, Sec. 7 in H.R. 7155), as follows:

The provisions of the Federal reclamation laws shall not be applicable to water deliveries or to the use of drainage facilities serving lands under contract with the State to receive a water supply, outside of the Federal San Luis unit service area described in the report of the Department of the Interior, entitled "San Luis Unit, Central Valley Project," dated December 17, 1956.

¹ 105 Cong. Rec. 7484.

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Senators Douglas, Morse, and Neuberger offered an amendment to strike Section 6(a). After extended debate the Senate struck the provision. In the House, Mr. Ullman offered an amendment to strike Section 7. The House also eliminated the language.

Proponents of S. 44 in the Senate contended the language of Section 6(a) was surplusage and that even without it Federal acreage limitations would not apply to the State service area.² However, they disagreed on the effect of striking the language. Senator Engle thought striking it would not constitute an expression of any congressional intent.³ Senator Kuchel expressed a fear that striking it might be construed as an expression of congressional intent that the excess-land laws should apply to the State service area.⁴

Senator Douglas took the position that "the elimination of Sec. 6(a) will make it clear it is the intent of Congress that Federal reclamation law shall not be barred from applying to" the State service area.⁵ Senator Morse said:

Let me state the situation as I believe it to be: With section 6(a) out of the bill, the Federal reclamation laws will remain unchanged. Then it will be for the courts to determine to what extent, if any, the Federal reclamation laws apply to the various phases of the San Luis project.⁶

These views were also reflected in the House where the amendment striking Section 7 of H.R. 7155 was debated. The House Interior and Insular Affairs Committee had rejected an amendment offered by Congressman Ullman to strike Section 7. Mr. Ullman and five other Congressmen signed a minority report indicating their nonconcurrence in the inclusion of Section 7 in the bill. The majority report claimed that Section 7 merely restated the law because accelerated repayment of construction charges precludes the application of Federal acreage limitations. This thesis is unsound.⁷

When H.R. 7155 reached the floor of the House, Representative Ullman again offered his amendment to delete Section 7. In the debate, the supporters of Section 7 averred that it merely restated the law. Representative Cohelan took the position that the acreage limitation should apply to the State's use of the water stored in the joint-use facilities.⁸ Mr. Ullman⁹ and the other supporters of his amendment,

² Senator Engle: "I want to make a record which is very plain indeed that in my opinion the section is surplusage. It is merely a statement of what the law is" (105 Cong. Rec. 7496).

³ 105 Cong. Rec. 7682.

⁴ 105 Cong. Rec. 7989.

⁵ 105 Cong. Rec. 7867.

⁶ 105 Cong. Rec. 7989.

⁷ See my opinion of this date, "Excess Land Limitations, Kings and Kern River Projects."

⁸ 106 Cong. Rec. 10467.

⁹ 106 Cong. Rec. 10556.

Representatives McFall,¹⁰ Miller,¹¹ and Roosevelt,¹² took the position that Section 7 might change Federal law and should thus be omitted. They did not express the intent necessarily to apply acreage limitations to the State service of water, but merely to assure that the Federal reclamation law would not be changed by the San Luis Act. The House supported the Ullman amendment 215 to 179.¹³

The House then amended S. 44 by substituting text of the House bill for all after the enacting clause in the Senate bill.¹⁴ In the Senate, the bill was quickly adopted after Senator Anderson assured Senator Proxmire that the acreage-limitation question debated in the previous year in the Senate had not been adversely affected by the House amendments.¹⁵

Normally, when an exemption is removed from a bill before enactment, the presumption is that the legislative body intended the law to apply in the situation described in the exemption. To apply the rule here would be to say that Congress expressed its intent that the excess-land laws should apply to State water deliveries. While some legislators probably had such an intent when they voted for the amendments, the legislative history indicates that this intent was not shared by all who so voted. Some took the view that the excess-land laws would not apply to the State even without the exemption but that the exemption might in some harmful way change the application of the acreage limitation in the Federal service area. As Senator Carroll put it:

I am willing to go on record as to my legislative intent. I think the State of California should have control and jurisdiction over its own waters.¹⁶

* * * * *

There is a deep-seated feeling that, however unwitting, an attempt is being made to undermine the effect of the Federal reclamation laws, which are vital to the West. Whether that feeling is founded on fact, the question has been raised. The more I think of the question and the more I listen to the debate, the more I feel section 6(a) must come out of the bill.¹⁷

Others took the view expressed by Senator Morse:

It is our position that we ought to leave to the courts the determination of these legal questions. We believe that even if section 6(a) is left in the bill, those questions will still have to be left to the courts. However, we also believe that section 6(a) confuses the issue. We believe that both sides in the controversy stand on an equal footing before the courts if we let the application of the bill go to the courts with section 6(a) eliminated.¹⁸

¹⁰ 106 Cong. Rec. 10466.

¹¹ 106 Cong. Rec. 10556.

¹² 106 Cong. Rec. 10556.

¹³ 106 Cong. Rec. 10563.

¹⁴ 106 Cong. Rec. 10566.

¹⁵ 106 Cong. Rec. 10696.

¹⁶ 105 Cong. Rec. 7873.

¹⁷ 105 Cong. Rec. 7873.

¹⁸ 105 Cong. Rec. 7683.

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While strong arguments were made in both the House and Senate for the exemption incorporated in Sections 6(a) and 7, and both committees reporting on the bill supported it, one of its leading proponents, Senator Engle, of California, acknowledged that it might just as well rest on an interpretation of existing law by the courts. His position was expressed by Senator Morse as follows:

The junior Senator from California, in my judgment, has never gone as far as the senior Senator from California has gone in respect to section 6(a). He has left me with the impression that he would be perfectly willing to have section 6(a) come out of the bill, because he does not believe it makes any difference whether it stays in or comes out. Of course, the junior Senator from California is in a position that many of us find ourselves in from time to time. He would like to go along with his colleague, because his colleague, the senior Senator from California, happens to be the leader in the fight for section 6(a), and therefore the junior Senator is not advocating deleting section 6(a). But certainly he has made it clear in the debate that he has no objection if it comes out. In other words, he is not insisting that it stay in.¹⁹

To this Senator Engle replied: "The distinguished Senator from Oregon has represented my position correctly."²⁰

In my opinion the legislative history clearly indicates that Congress did not intend to require application of Federal acreage limitations by striking Sections 6(a) and 7.

This brings us back to the question whether the Secretary being governed by the Federal reclamation laws "* * * in constructing, operating, and maintaining the San Luis unit * * *," must for that reason insist that landowners in the State service area comply with Federal acreage limitations. The legislative history makes plain the specific area embraced by the term "Federal service area" and the term is used in the Act as referring to a specific area. The State service area is never defined and is characterized in the Act as an area "outside the Federal San Luis unit service area."

It must be determined, then, what is included by the term "San Luis unit." From the text of the Act it is plain that the unit includes the joint-use facilities and the facilities used exclusively for the Federal service area. Does it include the State service area?

Section 1 of the Act provides that the Secretary may not commence construction until he has—

* * * secured, or has satisfactory assurance of his ability to secure, all rights to the use of water which are necessary to carry out the purposes of the unit and the terms and conditions of this Act * * *.

If the Secretary cannot proceed until he has secured rights for the use of water for the State service area, it is plain that he cannot ever commence construction of the San Luis unit. The State of California had already initiated action to secure the rights to the use of water for

¹⁹ 105 Cong. Rec. 7994.

²⁰ 105 Cong. Rec. 7994.

the State service area and it was never contemplated that the Secretary should secure such rights. Indeed, the United States had already agreed with the State of California on the division of water and the right to the use of water for the State service areas had already been allocated to the State by said agreement.²¹ By the same agreement the water for the Federal San Luis unit service area was allocated to the United States.

The words of Section 1, then, limit the definition of the term "San Luis unit" so as to exclude a State service area, for it is obvious that the Secretary must acquire all necessary rights to the use of water for the purposes of the unit but not for the use of water in the State service area.

Section 1 further provides that the Secretary may not commence construction until he—

*** has *** received satisfactory assurance from the State of California that it will make provision for a master drainage outlet and disposal channel for the San Joaquin Valley, as generally outlined in California water plan, Bulletin Numbered 3, of the California Department of Water Resources, which will adequately serve, by connection therewith, *the drainage system for the San Luis unit* or has made provision for constructing the San Luis interceptor drain to the delta designed to meet the *drainage requirements of the San Luis unit* as generally outlined in the report of the Department of the Interior entitled "San Luis Unit, Central Valley Project," dated December 17, 1956. [Italics supplied.]

Here again is a reference to *the* San Luis unit and this time the reference is tied to a report of the Department of the Interior. An examination of the report referred to defines the San Luis service area as follows:

The irrigated area of the San Luis Unit would contain about 485,000 irrigable acres. The western boundary of the service area would be elevation 485 as far south as the Pleasant Valley Canal, and, from there it would average 455 feet in elevation, the grade of the Pleasant Valley Canal. The eastern boundary of the proposed service area is an irregular line representing the eastern edge of the better quality soils. Before construction begins minor modifications in these service area boundaries would be possible, but the irrigable acreage to be served now cannot be increased because of water supply limitations. The service area boundary is shown on plate 1. (Pages 23 and 24.)

Plate 1 referred to is entitled "Central Valley Project—Ultimate Plan—West San Joaquin Div.—San Luis Unit—Calif. SERVICE AREA." The service area of the San Luis unit is outlined on plate 1. Clearly the San Luis unit includes an area of irrigable land.

The "drainage requirements for the San Luis unit" are also described in the report at pages 73 and 74 as follows:

²¹ Agreement between the United States of America and the Department of Water Resources of the State of California for the Coordinated Operation of the Federal Central Valley Project and the State Feather River and Delta Diversion Projects, dated May 16, 1960, Contract No. 14-06-200-8363.

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Approximately 96,000 acres along the lower fringes of the service area will require a drainage system for the disposal of saline water unsuitable for reuse. The closed drain system for this area would consist of tile pipe drains, 10-inches to 24-inches in diameter, located at one-half mile intervals at approximate depths of 10 feet. The tile pipe would be connected to open drains carrying the waste flows to the interceptor drain. Trap boxes for deposit of silt would be provided in all closed drains at intervals of one-sixth mile. The San Luis interceptor drain, approximately 197 miles in length, would be an earth section channel extending from the vicinity of Kettleman City to Dutch Slough in the San Joaquin-Sacramento Delta. It would have a capacity of 300 cubic feet per second. Major structures along the interceptor drain include siphons under wasteways, floodways, existing canals, railroads, and highways; siphon spillways; reinforced concrete drops; State and County highway and farm road bridges; culverts; and irrigation ditch crossings. The closed pipe drain system would have a capacity sufficient to accommodate accumulated flows of one cubic foot per second for each mile of drain. The total volume of water to be wasted which would be handled by the drain system and interceptor drain would be approximately 127,000 acre-feet annually.

Further reference to plate 1 indicates that the drainage requirements of the San Luis unit are limited to the drainage requirements of the Federal San Luis unit service area. The conclusion is therefore inescapable that the San Luis unit does not include any lands "outside the Federal San Luis unit service area" and that it does not include the State service area.

Therefore, when the Act states that "in constructing, operating, and maintaining the San Luis unit, the Secretary shall be governed by the Federal reclamation laws," it directs the Secretary to apply reclamation law, not to the State service area but to the Federal service area, which is the only area included in the unit.

Having determined that the language just quoted does not require the application of Federal acreage limitations to the State service area, we must next inquire whether anything else in the Act or in its legislative history requires this result. We have already seen that the elimination of Section 6(a) from the Senate bill and of Section 7 from the House bill cannot be interpreted as an expression of an intent to apply acreage limitations to the State service area.

The concern of those opposed to the inclusion of Section 6(a) and Section 7 was to insure that the benefits of Federal expenditures should not be conferred on owners of excess lands and to insure that the nature of the Federal-State relationship would be the determining factor rather than the specific exemption they opposed. As the minority of the House committee reported:

* * * We cannot ignore the public interest in the handling of any Federal reclamation project in connection with the real possibility of enhancement of huge private interests through interest-free Federal investment. The intent of the basic Reclamation Act was to use such Federal investment so that no right to the use of water for land in private ownership exceeded 160 acres to any one landowner.

H.R. 7155 authorizes a Federal reclamation project upon which the State is given authority to superimpose a State project addition. The arrangement will be worked out by contract. These are new and untried areas for reclamation. Under these circumstances it is imperative that we protect Federal interests and the basic concept of Federal reclamation law. By deleting section 7, we feel that this will be accomplished.²²

The inquiry then is what is the nature of the Federal-State relationship upon which the opponents of Sections 6(a) and 7 conceived the issue to turn.

In the House the principal opponents of Section 7 were Representative Cohelan, of California, and Representative Ullman, of Oregon. Hereafter are a series of statements made by these Representatives during the House debate.

Mr. COHELAN. Is the project as to San Luis more Federal or more State? I am not clear on the hybrid character of it. It seems to me this is a very important point, because whether or not it is more Federal than State or more State than Federal has a great deal to do with whether the reclamation law applies * * *.²³

Mr. Chairman, the amendment to delete section 7 from H.R. 7155 is intended to do only one thing, namely, remove that section of this bill which predetermines that Federal reclamation law shall be applied on the basis of who carries water from the San Luis Reservoir, the section which completely ignores the extensive Federal interest in San Luis itself and in the vast facilities which will bring that water to the San Luis pool.

Congress cannot ignore that Federal interest. Indeed, the sole job of the Congress in this matter is to jealously protect the Federal interest.²⁴

* * * * *

Mr. ULLMAN. The issue is this: Shall Federal benefits and Federal safeguards follow Federal investment? I am not here to tell you that we should try to superimpose upon the State all of our Federal requirements. All I say is that Federal benefits should follow Federal investments. If we leave out section 7, you have a complete bill.²⁵ * * *

We are not attempting to foist anything upon the State. All we want to do is to safeguard our Federal investment; make sure we maintain the safeguards on the Federal investment.²⁶

Mr. ULLMAN. We have here a Federal-State project where an arrangement has not been worked out. We have no agreement and I have no way of knowing and no one has any way of knowing where the benefits will flow at this time. I only want Federal benefits to follow where Federal investment is made.²⁷

In the Senate Senators Douglas,²⁸ and Morse,²⁹ expressed similar views.

The basis for opposing the granting of an exemption was the objection to the landowners in the State service area enjoying the benefits

²² H. Rept. No. 399, 86th Cong., 1st Sess., p. 25.

²³ 106 Cong. Rec. 10453.

²⁴ 106 Cong. Rec. 10467.

²⁵ 106 Cong. Rec. 10556.

²⁶ 106 Cong. Rec. 10556.

²⁷ 106 Cong. Rec. 10559.

²⁸ 105 Cong. Rec. 7497, 7672.

²⁹ 105 Cong. Rec. 7992.

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of Federal expenditures. Senators Douglas and Morse and Representative Cohelan assumed as a fact what was not a fact, that is, that the State service area would get the benefit of Federal investments. The Secretary is authorized by Section 2 of the Act to enter into an agreement so that the State could deliver water in its service areas "* * * without cost to the United States * * *."

Representative Ullman saw the issue clearly. He said that he had "* * * no way of knowing, and no one has any way of knowing, where the benefits will flow at this time."³⁰

The assumption by some of the legislators that benefits would be conferred on the State service area which were produced by a Federal investment, referred specifically to the reclamation dams upstream in Northern California,³¹ the Delta cross channel, the Delta-Mendota canal, the Tracy pumping plant, and the sturdier base required for the joint-use facilities which will increase their capacity to provide both Federal and State needs. Also mentioned was the power produced at Federal dams up river.

If the State were to develop its own water at Oroville, release it so that it eventually discharged into the Sacramento-San Joaquin Delta and then were to take it out again to supply a project entirely its own, Federal reclamation laws would not apply to that project merely because State water had been commingled with water from Federal projects.

Senator Morse's suggestion that courts "may find that the 160-acre limitation does not apply to commingled waters" (105 Cong. Rec. 7871) is to the point and borne out by the authorities. It is the law that rights to the use of waters are not affected by their being commingled in a natural watercourse.³²

I have requested the Commissioner of the Bureau of Reclamation to provide data concerning the San Luis unit. His memorandum, attached hereto as an Appendix A, discloses that the State will not use the Delta cross channel, the Tracy pumping plant, or the Delta-Mendota canal.

The use of the electricity at Federal dams to provide power at State projects cannot require the application of reclamation law. Federal power is for sale by the Bureau of Reclamation. It is possible, but by no means certain, that the California Water Resources Board will purchase some of its needs from the Bureau. However, there are thousands of users of Federal power in the West who are not required to comply with Federal reclamation laws. No statute has been found to suggest that Federal power, like Federal water, is available only to those who comply with Federal reclamation laws.³³

³⁰ Page 420, *supra*.

³¹ Trinity, Shasta, Keswick, Folsom, Nimbus, Sly Park. See 105 Cong. Rec. 7672.

³² 1 Wiel, *Water Rights in the Western States* (3d Ed.), pp. 35-39.

Indeed, there is a special rate for power used for Federal project pumping. This is lower than the rate charged non-Federal power users. In its operation of the San Luis, the State will not have the benefit of the Federal pumping rate.³³

It was also erroneously stated in the debates that in the operation of the San Luis unit itself the State lands would have the benefit of a Federal subsidy. For example, Senator Douglas said:

Mr. President, the main new project which is to be carried out by the Federal Government under this bill is the dam creating the so-called San Luis Reservoir. This dam is to be constructed with Federal money, and the initial water behind this dam, therefore, will be water entirely assembled because of Federal expenditures.

The rather indefinite proposal which is contained in the bill and which is supported by the testimony with respect to the bill is that the height of the dam will then later be raised as a result of expenditures by the State of California. Hence it is argued that the quantity of water impounded behind the dam will be increased and the added amount of water would be due to State expenditures and would not be in any degree Federal water.

The contention of the Senator from Oregon and of the Senator from Illinois is that one cannot cut the dam in two any more than Solomon's child could be cut in two. One cannot build a second story on a dam without a substructure going down deep into the earth, into the rocky formation, which is probably a more important part of every dam than that which is above surface. One cannot build a second story unless one has a first story.³⁴

A close examination of the Act will reveal that the general statement that water for the State service area is to be supplied "without cost to the United States" is carried out by the detailed requirements. Section 3 prescribes the provisions to be included in the agreement between the United States and the State. Subsection (b) of Section 3 provides that:

The State shall make available to the Secretary during the construction period sufficient funds to pay an equitable share of the construction costs of any facilities designed and constructed. * * *

to such capacities that will permit immediate joint use by the State and the United States, or to such capacities as will permit future enlargement to accommodate the needs of the State. The proposed agreement provides that these payments are to be made monthly in advance. Subsection (d) of Section 3 of the Act reads:

The United States and the State shall each pay annually an equitable share of the operation, maintenance, and replacement cost of the joint-use facilities.

Therefore, it is plain that the State will pay not only for a "second story," as Senator Douglas puts it, but also will pay in advance its equitable share of the cost of the "first story."³⁵

³³ Appendix B attached.

³⁴ 105 Cong. Rec. 7671.

³⁵ The inclusion of facilities for the storage and delivery of water "to areas outside of the Federal San Luis unit service area" will not only not require any Federal investment, it will result in substantial saving to the United States in providing irrigation service to the Federal service area. Appendix C attached.

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The question now is, do the Federal acreage limitations apply to lands served "at no cost to the United States," by this joint Federal-State project? This question involves important relationships between the United States and the State. Section 2 of the Act of February 21, 1911³⁶ (hereinafter referred to as the Warren Act), authorizes the Secretary of the Interior

* * * to cooperate with irrigation districts, water users associations, corporations, entrymen, or water users for impounding, delivering, and carrying water for irrigation purposes: *Provided* * * * That water shall not be furnished from any such reservoir or delivered through any such canal or ditch to any one landowner in excess of an amount sufficient to irrigate one hundred and sixty acres * * *.

Did Congress, in the San Luis Act, intend that Section 2 of the Warren Act should govern the Secretary of the Interior in the administration of the San Luis unit?

While it is not necessary to decide here whether a State may be included in the terms of "irrigation districts, water users' associations, corporations, entrymen, or water users," I have no doubt that a State may be a contracting party under the Warren Act.

However, the State of California, in its participation with the United States in the San Luis project, is itself exercising far more than the powers of an irrigation district or water-user association. It is exercising the highest function of a sovereign. Senator Kuchel described the State plan in these words:

* * * Meanwhile, the people of the State, through their State government, have gone forward in the development of plans for a series of water projects to be developed and built by the State to bring supplemental water to those areas which need it by reason of the tremendous increase in population in my State.

The State water plan, as conceived by the State government, is an \$11 billion undertaking. A portion of the State water plan is termed the Feather River project. In a word, a State project by which supplemental northern water would be transported over the mountains or around the coastline of Santa Barbara and Ventura Counties into all the areas of southern California, to be used in the main, of course, for supplying supplemental water for people and for industry as well as for agriculture.³⁷

An examination of the California Water Plan, referred to in Section 1 of the San Luis Act, reveals that the water to be collected at the dam at Oroville on the Feather River will be transported through the San Luis reservoir and canals to a State service area which may include irrigable land, and certainly includes the municipalities of Santa Bar-

³⁶ 36 Stat. 926.

³⁷ S. Rept. No. 154, 86th Cong., 1st Sess., p. 19.

bara, Los Angeles, and San Bernardino in southern California. The scope of the plan is described in its text, as follows:

The final phase of the State-wide Water Resources Investigation is presented herein as "The California Water Plan." Bulletin No. 3 describes a comprehensive master plan for the control, protection, conservation, distribution, and utilization of the waters of California, to meet present and future needs for all beneficial uses and purposes in all areas of the State to the maximum feasible extent. The Plan is designed to include or supplement rather than to supersede existing water resource development works, and does not interfere with existing rights to the use of water * * *.

The California Water Plan includes local works to meet local needs in all portions of the State. It also includes the California Aqueduct System, an unprecedented system of major works to redistribute excess waters from northern areas of surplus to areas of deficiency throughout the State. The Plan gives consideration to water conservation and reclamation; to flood control and flood protection; to the use of water for agricultural, domestic, municipal, and industrial purposes; to hydroelectric power development; to salinity control and protection of the quality of fresh waters; to navigation; to drainage; and to the interests of fish, wildlife, and recreation. It contemplates the conjunctive operation of surface and ground water reservoirs, which operation will be essential to regulation of the large amounts of water ultimately to be involved * * *.

The California Water Plan is a master plan for the control, conservation, protection, and distribution of the waters of California, to meet present and future needs for all beneficial uses and purposes in all areas of the State to the maximum feasible extent. It is a comprehensive plan which would reach from border to border both in its constructed works and in its effects. The Plan is a flexible pattern susceptible of orderly development by logical progressive stages, the choice of each successive incremental project to be made with due consideration to the economic and other pertinent factors governing at the particular time. (Pages XXV and 37.)

In the debates on the San Luis Act the principal issue was the elimination of provisions expressly exempting the State service area. There was no clearly expressed consensus as to what reclamation law would mean with the exemption eliminated.³⁸ However, a common denominator of legislative intent can be derived from the debates.

First, Congress intended that no benefits were to be conferred on the State service area by Federal investments without carrying the burdens of Federal law.

Second, Congress intended no encroachment on the right of the State to develop its own resources, unless Federal interests could not otherwise be protected.

Senator Douglas, who represented those urging an extension of Federal law, finally came around to the view that "the elimination of Section 6(a) will make it clear it is the intent of Congress that Federal reclamation law shall *not be barred* from applying" to the

³⁸ "I think whoever reads the Record should understand that there is no perfect unanimity of opinion and, therefore, no clear legislative intent concerning this question." Sen. Carroll, 105 Cong. Rec. 7989.

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State service area.³⁹ This is the view expressed by Senator Carroll⁴⁰ and, in the House, by Representative Ullman,⁴¹ who disavowed any intention unreasonably to foist Federal law on the State.

Nearly everyone characterized the arrangement at San Luis as unique. Certainly no one suggested that the only result consistent with reclamation law was to impose acreage limitations on the State. Indeed the real issue was recognized by Senator Morse, who said:

Let me ask the Senators from California whether they have ever thought that it is not beyond the realm of legal possibility that the courts might say that, because the two sovereigns entered into a joint enterprise, there was a great modification in respect of the application of the reclamation laws. I do not know what the Court would hold. So far as I know, there is no U.S. Supreme Court decision precisely interpreting the legal effect of a joint venture of this type.⁴²

In *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, the Supreme Court considered an Act and its legislative history in many respects similar to the one here being considered. There, as here, Congress had omitted to be specific and had “* * * left to the Administrator and the courts a task of unexpected difficulty.” Here as there “relevant authorities and considerations are numerous and equivocal, and different plausible definitions result from a mere shift of emphasis.” The case involved a conflict between a wartime price regulation by the United States Price Administrator and a State Railroad Commission. The Court resolved the issue in favor of State control saying:

We think Congress desired to depart from the traditional partitioning of functions between State and Federal government only so far as required to erect emergency barriers against inflation. No question as to the power of Congress to reach and regulate this business, should it find it necessary to do so, has been raised here. But as matter of policy Congress may well have desired to avoid conflict or occasions for conflict between federal agencies and State authority which are detrimental to good administration and to public acceptance of an emergency system of price control that might founder if friction with public authorities be added to the difficulties of bringing private self-interest under control. Where Congress has not clearly indicated a purpose to precipitate conflict, we should be reluctant to do so by decision. (321 U.S. 151-152.)

“It will not be presumed that a Federal statute was intended to supersede the exercise of the power of the State unless there is a clear manifestation of an intention to do so.” *Schwartz v. Texas*, 344 U.S. 199, 202, 203. See also *Reid v. Colorado*, 189 U.S. 137; *Savage v. Jones*, 225 U.S. 501, 533; *Atchison, T. & S.F.R. Co. v. Railroad Commission*, 283 U.S. 380, 392. The Supreme Court has recently de-

³⁹ 105 Cong. Rec. 7867. [Emphasis supplied.]

⁴⁰ See page 416, *supra*.

⁴¹ See page 420, *supra*.

⁴² 105 Cong. Rec. 7684.

lined the national policy requiring acreage limitation. In *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 297, the Court said, "The excess acreage provision acts as a ceiling, imposed equally upon all participants, *on the Federal subsidy that is being bestowed.*" [Italics supplied.]

This policy was recognized and acknowledged in the hearings, reports and debates on the San Luis Act. The Act itself refers to the Warren Act and when it does it limits its application to that aspect of the Warren Act which implements a national policy that Federal law must accompany Federal subsidy. Section 5 reads in part as follows:

The Secretary is also authorized to permit the use of the irrigation facilities of the San Luis unit, including its facilities for supplying pumping energy, under contracts entered into pursuant to section 1 of the Act of February 21, 1911.

In *Davies* the Court had for a guideline a clearly defined Federal policy: a policy "to erect emergency barriers against inflation." Similarly, here, we have a clearly defined Federal policy: a policy that Federal law shall follow Federal investment.

Section 2 of the Warren Act standing alone requires the application of acreage limitations where the United States cooperates with an entity in the construction of irrigation facilities even where no Federal subsidy is extended to the lands served by the entity.

However, the legislative history of the San Luis Act exhibits a recognition by the Senate and the House that acreage limitation should apply where Federal investment is made and because of the Federal investment.⁴³ The Warren Act was enacted in 1911, before the maturity of national reclamation policy and long before anyone could get water for more than 160 acres by agreeing to sell his excess lands.

I am convinced that the problem we face here is precisely that faced by the Court in *Davies* and to which Senator Morse referred.⁴⁴ We have a clearly defined Federal policy to apply to an act of doubtful meaning. In the consideration of the San Luis Act the Congress was scrupulous to avoid conflict with legitimate State authority. To paraphrase the words of the *Davies* opinion we should not precipitate a conflict with a State which Congress was careful to avoid, unless such conflict is necessary to carry out national policy.

Since the San Luis Act and national reclamation policy do not require the application of Federal acreage limitations to the State service area, and since the application of Federal law to the State service area would clash with another basic national policy to leave the States free where Federal interests are not impaired, I have concluded that Federal acreage limitations do not apply to the State

⁴³ Senator Douglas, 105 Cong. Rec. 7672.

⁴⁴ See page 425, *supra*.

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service area and that the proposed agreement for San Luis may be signed by you in its present form.

FRANK J. BARRY, *The Solicitor.*

APPENDIX A

DECEMBER 20, 1961.

To the Solicitor

Subject: Operation of the State Water Resources Development System with specific reference to the joint-use facilities of the San Luis Unit

Neither the State Water Plan nor the proposed San Luis Agreement now under consideration by the Secretary contemplates the use of Central Valley Project facilities, other than the joint-use facilities identified in that agreement, to serve the State's service area.

The May 16, 1960, agreement with the State provides for a division of waters available to the United States and to the State in the delta. The water available to the State to meet its requirements in connection with the proposed San Luis Agreement was considered to come from the yield at Oroville Reservoir and surplus flows available in the delta for transfer to and storage in its portion of the storage capacity in the San Luis Reservoir. The flows available to it in the delta were determined on the basis of surplus flows available after the diversion requirements of the Federal Central Valley Project, including the San Luis Unit, had been satisfied.

In order to provide service to its service area, the State has scheduled the construction of its project in such a manner as to have facilities required to provide its own service when that service is required. Specifically, Oroville Dam, the State's pumping plant in the delta, and the State's canal from the delta to the forebay to San Luis Reservoir are scheduled for completion by 1968. Neither the State Water Plan nor the proposed San Luis Agreement provides for the use of the Tracy pumping plant, the Delta-Mendota Canal, the Delta Cross Channel, or any Central Valley storage facilities to provide water to the State's facilities.

In considering the power requirements of the joint-use San Luis features, the proposed San Luis Agreement contemplates the State shall furnish to the San Luis switchyard the energy required to lift the quantity of water into San Luis Reservoir that it stores in that reservoir, which water is delivered to the San Luis forebay through its facilities from the delta. The agreement also contemplates the State will supply the energy requirements to lift water at the Mile 18

pumping plant that is delivered to its facilities at Kettleman City, the terminus of the joint San Luis Canal.

If, at some future date, the State is successful in procuring some of its energy requirements from United States facilities, such energy will be supplied under a commercial-type contract, the same as is now in force with all other preference customers.

Federal Central Valley Project water requirements for the Federal San Luis Unit are accounted for and identified in permits obtained from the State Water Rights Board.

(Sgd.) FLOYD E. DOMINY,
Commissioner of Reclamation.

APPENDIX B

DECEMBER 20, 1961.

TO THE SOLICITOR

Subject: Marketing of Central Valley Project power to State of California.

You have inquired as to certain phases of the marketing of power from Central Valley Project to the State of California, and in connection therewith we advise as follows:

1. Power developed by the Bureau of Reclamation and marketed by it is not now being supplied nor will it in the future be supplied to the State of California for irrigation pumping as a part of Federal project use.
2. Any power sold to the State for irrigation pumping or any other purposes would be sold under standard project rates applicable to all customers.
3. The Bureau of Reclamation presently has an effective contract with the State of California for its pumping needs at its South Bay Aqueduct pumping plant.

The general conditions of this contract are as follows:

Maximum contract rate of delivery 3,260 kw. Service to be limited to Sundays, holidays, and the hours before 7:00 a.m. and after 10:00 p.m. on all other days.

Rate Schedule R2-F2 which provides an estimated average rate per kwhr. of 5.5 mills after allowing five percent discount for service at transmission voltage. The rate schedule referred to is the standard Central Valley Project rate schedule applicable to all firm power service.

PG&E will wheel power the South Bay Aqueduct pumping plant at a cost to the United States of $1\frac{1}{3}$ mill/kwhr. However,

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the total cost to the U.S. is limited to \$55,600 during the contract term which ends December 31, 1970.

(Sgd.) FLOYD E. DOMINY,
Commissioner of Reclamation.

APPENDIX C

DECEMBER 20, 1961.

TO THE SOLICITOR

Subject: Savings to the Federal Government through joint Federal-State construction of certain features of the San Luis Unit, Central Valley Project.

The attached table entitled "Capital Cost Allocation—Joint San Luis Division" indicates the extent of the construction cost savings to the Federal Government through joint construction of the features listed.

The second column under the broad heading "Share the Savings Method" shows the total cost of features involved if constructed by the Federal Government to serve the Federal San Luis Unit without State participation to be \$226,038,000. Through joint construction with State participation, the Federal share of joint costs to achieve the same service to the Federal San Luis Unit would be \$196,211,000 under the "Share the Savings Method." The actual saving of costs provided for in the proposed agreement would assign a slightly lower portion of the joint costs, \$194,827,000, to the Federal Government. Thus, a savings to the Federal Government of \$31,211,000 would be possible through Federal-State sharing of the construction costs of the joint features.

The estimate of \$45,557,000 for the cost of a San Luis Dam and Reservoir to serve only the Federal San Luis Unit does not include provision for future enlargement assigned by the authorizing legislation. If such provision were included, a further savings to the Federal Government would be indicated.

While the above figures will vary as final designs and estimates are completed and actual construction costs incurred, we expect that the savings would remain of the same general magnitude.

There would be additional savings in the operation, maintenance, and replacement costs of the completed joint features. The magnitude of the savings will, of course, be determined by the agreement yet to be reached on the sharing of these costs.

(Sgd.) FLOYD E. DOMINY,
Commissioner of Reclamation.

CAPITAL COST ALLOCATION—JOINT SAN LUIS DIVISION

(A) Peak Capacity Method

Feature	Cubic feet per second				Thousand dollars			
	Total	Federal	Percent	State	Percent	Joint	Federal	State
San Luis Dam and Reservoir-----	2, 100	1, 000	47. 62	1, 100	52. 38	101, 530	48, 349	53, 181
San Luis Forebay ¹ -----	2, 100	1, 000	47. 62	1, 100	52. 38	10, 670	5, 081	5, 589
San Luis pumping-generating ¹ plant-----	2, 100	1, 000	47. 62	1, 100	52. 38	91, 400	43, 525	47, 875
Mile 18 pumping plant-----	13, 100	6, 000	45. 80	7, 100	54. 20	38, 330	17, 555	20, 775
San Luis Canal: ²								
Reach 1 ¹ -----	2, 100	1, 000	47. 62	1, 100	52. 38	38, 117	18, 151	19, 966
Reach 2-----	13, 100	6, 000	45. 80	7, 100	54. 20	29, 811	13, 653	16, 158
Reach 3-----	11, 800	4, 700	39. 83	7, 100	60. 17	51, 807	20, 635	31, 172
Reach 4-----	9, 350	2, 300	24. 60	7, 050	75. 40	11, 519	2, 834	8, 685
Reach 5-----	8, 350	1, 300	15. 57	7, 050	84. 43	19, 531	3, 041	16, 490
San Luis floodworks ³ -----			50. 00		50. 00	33, 097	16, 549	16, 548
Power facilities:								
San Luis switchyard-----	2, 100	1, 000	47. 62	1, 100	52. 38	4, 268	2, 032	2, 236
San Luis-M transmission line-----	13, 100	6, 000	45. 80	7, 100	54. 20	1, 243	569	674
Mile 18—switchyard-----	13, 100	6, 000	45. 80	7, 100	54. 20	1, 625	744	881
Total cost-----						432, 948	192, 718	240, 230
Percent-----							44. 51	55. 49

See footnotes at end of table.

December 26, 1961

CAPITAL COST ALLOCATION—JOINT SAN LUIS DIVISION—Continued

(B) Water Delivery Method

Feature	Thousand acre-feet				Thousand dollars			
	Total	Federal	Percent	State	Percent	Joint	Federal	State
San Luis Dam and Reservoir	2, 100	1, 000	47. 62	1, 100	52. 38	101, 530	48, 349	53, 181
San Luis Forebay ¹	2, 100	1, 000	47. 62	1, 100	52. 38	10, 670	5, 081	5, 589
San Luis pumping-generating ¹ plant	2, 100	1, 000	47. 62	1, 100	52. 38	91, 400	43, 525	47, 875
Mile 18 pumping plant	4, 773	1, 250	26. 19	3, 523	73. 81	38, 330	10, 039	28, 291
San Luis Canal: ²								
Reach 1 ¹	2, 100	1, 000	47. 62	1, 100	52. 38	38, 117	18, 151	19, 966
Reach 2	4, 773	1, 250	26. 19	3, 523	73. 81	29, 811	7, 808	22, 003
Reach 3	4, 503	980	21. 76	3, 523	78. 24	51, 807	11, 273	40, 534
Reach 4	4, 023	500	12. 43	3, 523	87. 57	11, 519	1, 432	10, 087
Reach 5	3, 748	225	6. 00	3, 523	94. 00	19, 531	1, 172	18, 359
San Luis floodworks ³			50. 00		50. 00	33, 097	16, 549	16, 548
Power facilities:								
San Luis switchyard	2, 100	1, 000	47. 62	1, 100	52. 38	4, 268	2, 032	2, 236
San Luis-M transmission line	4, 773	1, 250	26. 19	3, 523	73. 81	1, 243	326	917
Mile 18 switchyard	4, 773	1, 250	26. 19	3, 523	73. 81	1, 625	426	1, 199
Total cost						432, 948	166, 163	266, 785
Percent							38. 38	61. 62

See footnotes at end of table.

CAPITAL COST ALLOCATION—JOINT SAN LUIS DIVISION—Continued

(C) *Share the Savings Method*

Feature	Thousand dollars							
	Total	Federal	Percent	State	Percent	Joint	Federal	State
San Luis Dam and Reservoir-----	93,191	45,557	48.89	47,634	51.11	101,530	49,638	51,892
San Luis Forebay ¹ -----	21,340	10,670	50.00	10,670	50.00	10,670	5,335	5,335
San Luis pumping-generating ¹ plant-----	75,852	30,606	40.35	45,246	59.65	91,400	36,880	54,520
Mile 18 pumping plant-----	41,276	18,966	45.95	22,310	54.05	38,330	17,613	20,717
San Luis Canal: ²								
Reach 1 ¹ -----	41,776	20,026	47.94	21,750	52.06	38,117	18,273	19,844
Reach 2-----	39,037	18,601	47.65	20,436	52.35	29,811	14,205	15,606
Reach 3-----	65,353	29,079	44.50	36,274	55.50	51,807	23,054	28,753
Reach 4-----	16,726	6,526	39.02	10,200	60.98	11,519	4,495	7,024
Reach 5-----	24,220	8,398	34.67	15,822	65.33	19,531	6,771	12,760
San Luis floodworks ³ -----	66,194	33,097	50.00	33,097	50.00	33,097	16,549	16,548
Power facilities:								
San Luis switchyard-----	5,172	2,405	46.50	2,767	53.50	4,268	1,985	2,283
San Luis-M transmission line-----	2,486	1,243	50.00	1,243	50.00	1,243	622	621
Mile 18—switchyard-----	1,776	864	48.65	912	51.35	1,625	791	834
Total cost-----	494,399	226,038	-----	268,361	-----	432,948	196,211	236,737
Percent-----							45.32	54.68

¹ These facilities are considered as complementary features to the main storage facility, capacity of which is given in thousands of acre-feet.

² Includes wasteway, right-of-way, and preconsolidation costs.

³ Capacities of San Luis floodworks are independent of the San Luis Canal capacity and therefore the costs have been split equally between the two agencies.

LANDS ELIGIBLE TO BE PLACED UNDER RECORDABLE CONTRACTS

Bureau of Reclamation: Excess Lands—Bureau of Reclamation: Recordable Contracts

Section 46 of the Act of May 25, 1926 (44 Stat. 636, 649, 43 U.S.C. 423e) does not authorize execution of a recordable contract covering excess lands acquired after execution of a water service or repayment contract between the United States and the contracting organization. *M-34999 distinguished.*

M-36613

July 18, 1961*

TO THE REGIONAL SOLICITOR, SACRAMENTO, CALIFORNIA.

Subject: Your memorandum of April 3, 1961, concerning request for recordable contract and approval of sale price of excess land—Katherine H. Haley—Saucelito Irrigation District—Central Valley Project

Your memorandum set out a situation where, in brief, a Mrs. Newman acquired by conveyance 240 acres of project land in the Saucelito Irrigation District, filed a nonexcess land designation for 160 acres and requested a recordable contract to permit water service for the remaining 80 acres of excess land. First, you request our opinion as to the authority to execute such a recordable contract with Mrs. Newman. These facts present a question not previously the subject of formal decision of the Department, namely, whether the recordable contract procedure for making excess lands eligible to receive project water may be exercised with respect to lands voluntarily acquired after the execution of the governing water service or repayment contract.

The answer lies in the proper construction of Section 46 of the Act of May 25, 1926, which provides that "all irrigable land held in private ownership by any one owner in excess of 160 irrigable acres" shall be appraised and that no such excess land shall receive water except upon the execution of a valid recordable contract for the sale thereof. Two alternative constructions of this provision are immediately suggested.

The first alternative construction is that a recordable contract may be employed only with respect to excess lands held at the time of execution of the District contract, in which case there would be an ascertainable area of excess land any part of which could be made eligible to receive water under recordable contract only for a predetermined period of time.

The second alternative construction would be that a recordable contract may be employed by an owner with respect to land which becomes excess upon his voluntary acquisition of such land subsequent to the execution of the District contract. If this were accepted, it would seem that through appropriate transfers and a series of recordable con-

*Not in chronological order.

tracts, substantial areas of lands might remain in the excess category and yet be eligible to receive water for the life of the project.

It is our view that the second alternative cannot be accepted consistently with the clear purpose of Section 46. One persuasive consideration in this connection is the Act of July 11, 1956 (70 Stat. 524) wherein the Congress permitted excess land involuntarily acquired by the means there set out to be furnished water for a period limited to five years from the effective date of acquisition, "delivery of water thereafter ceasing until the transfer thereof to a landowner duly qualified to secure water therefor." It is clear that in a case covered by this Act the person acquiring the excess land cannot extend its eligibility by the execution of a recordable contract, and it would seem *a fortiori* that this privilege would not be available in the case of voluntary acquisition where the owner is fully forewarned.

We are well aware of the Associate Solicitor's opinion of October 22, 1947 (M-34999) concerning the proposal of the Commissioner of Reclamation for action with respect to lands receiving water despite noncompliance with the excess-land provisions of the law. He held that while the failure of the administrative officers to carry out the provisions of the law did not enlarge the rights or privileges of the parties, it could form the basis for permitting a reasonable time and method for correcting the situation to one of compliance. The method administratively proposed was to permit the "continued delivery" of water upon the execution of recordable contracts of the sort contemplated in the law and for periods of time to be fairly determined. What the Associate Solicitor there dealt with was the question of administrative action in enforcing the excess land law under a determination that the action proposed was "calculated to effectuate the continuing policy of the Reclamation laws." Neither the opinion nor the program of Administrative Letter No. 303 deals with or refers to the question of bringing into eligibility lands which became excess to the owner at a time subsequent to the undertaking of the repayment obligation. As to such lands, for the reasons set out above, it cannot be concluded that execution of a recordable contract would effectuate the policy of the law. Rather, as is clear from the foregoing, such a procedure would be inconsistent with the policy inherent in the excess land provisions of Reclamation law.

For these reasons, you should advise the Regional Office that there is no authority to execute a recordable contract with the owner in the situation which you have submitted or in situations falling within the same principle.

Specifically, with respect to the transfer by Katherine Haley to Mrs. Newman, the question of approval of the purchase price involved in

July 26, 1961

the sale appears to be moot. This provision which you have quoted from Section 46 obviously applies to the sale of excess land under conditions which would permit its eligibility other than for the question of price, and this requires that it come into the hands of one who can hold it as a nonexcess owner.

EDWARD W. FISHER,
Acting Solicitor.

RICHFIELD OIL CORPORATION

A-28764*Decided July 26, 1961**

Rights-of-Way: Act of February 25, 1920

While the Department will not refuse to grant a right-of-way across public land for a natural gas pipeline in anticipation that the holder of the right-of-way will violate the common carrier obligation imposed on the holder of such a right-of-way by section 28 of the Mineral Leasing Act, the Department will state its view as to the meaning of the obligation so that it will be clear upon what basis the Department is issuing the right-of-way and will seek compliance.

Rights-of-Way: Act of February 25, 1920

The common carrier provision and the common purchase provision of section 28 of the Mineral Leasing Act express separate obligations; the common carrier provision requires at a minimum that the holder of a right-of-way for a natural gas pipeline construct and operate it to carry the gas of another without limitation as to whether the gas is produced from Government land.

PETITION FOR RECONSIDERATION

By decision dated January 16, 1961, former Assistant Secretary of the Interior George W. Abbott dismissed the protest filed by Southern Counties Gas Company of California against the grant to Richfield Oil Corporation of a right-of-way across public lands in California for a pipeline for the transportation of natural gas, under section 28 of the Mineral Leasing Act, as amended (30 U.S.C., 1958 ed., sec. 185).¹

*Not in chronological order.

¹ "Rights-of-way through the public lands, including the forest reserves of the United States, may be granted by the Secretary of the Interior for pipe-line purposes for the transportation of oil or natural gas to any applicant possessing the qualifications provided in section 181 of this title, to the extent of the ground occupied by the said pipe line and twenty-five feet on each side of the same under such regulations and conditions as to survey, location, application, and use as may be prescribed by the Secretary of the Interior and upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers and shall accept, convey, transport, or purchase without discrimination, oil or natural gas produced from Government lands in the vicinity of the pipe line in such proportionate amounts as the Secretary of the Interior may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine to be reasonable: *Provided*, That the common carrier provisions of this

On February 3, 1961, after advance notice filed on January 24, 1961, Southern Counties filed a petition for reconsideration of the decision. Richfield has filed an answer in opposition.

The pertinent facts are as follows:

On February 17, 1959, Richfield applied to this Department for a right-of-way across approximately 20 miles of public land within the Los Padres National Forest and one mile of public land outside the forest. Its application was accompanied by the stipulation required by this Department (43 CFR 244.62) agreeing to operate the pipeline as a common carrier in accordance with the provisions of the Mineral Leasing Act (30 U.S.C., 1958 ed., sec. 181 *et seq.*) and agreeing to file, within 30 days after the request of the Secretary of the Interior, rate schedule and tariff for the transportation of gas as such common carrier with any regulatory agency having jurisdiction over such transportation as the Secretary might prescribe. The application included a request that Richfield, pursuant to 43 CFR 244.8, be given advance permission to construct the line, pending the processing of the application. On April 10, 1959, Richfield obtained a temporary special use permit from the Forest Service, Department of Agriculture, to lay a pipeline across certain areas in the Los Padres National Forest. That permit also contained the above-mentioned stipulation. No action was taken by the Bureau of Land Management toward granting Richfield advance permission pursuant to 43 CFR 244.8 to construct any portion of the pipeline, especially the one-mile stretch lying outside the national forest. However, Richfield proceeded with the construction of its line on April 7, 1959, and completed construction on July 23, 1959.

On June 1, 1959, Southern Counties filed a protest with the Director of the Bureau of Land Management, alleging that Richfield did not, when it signed the common carrier stipulation, intend to comply with it. On June 17, 1959, Richfield was called upon by the land office, by direction of the Director, to file its common carrier transportation tariff with the Public Utilities Commission of the State of California within 30 days and to file evidence of such action with the land office or suffer the rejection of its application. Richfield resisted this requirement, by way of an application for reconsideration of the decision of June 17, 1959, on the ground that the Public Utilities Com-

section shall not apply to any natural gas pipeline operated by any person subject to regulation under the Natural Gas Act or by any public utility subject to regulation by a State or municipal regulatory agency having jurisdiction to regulate the rates and charges for the sale of natural gas to consumers within the State or municipality: *Provided further*, * * * That no right-of-way shall hereafter be granted over said lands for the transportation of oil or natural gas except under and subject to the provisions, limitations, and conditions of this section. Failure to comply with the provisions of this section or the regulations and conditions prescribed by the Secretary of the Interior shall be ground for forfeiture of the grant by the United States district court for the district in which the property, or some part thereof, is located in an appropriate proceeding."

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mission had jurisdiction only over public utilities which, Richfield contended, it was not. By telegram of July 17, 1959, the then Acting Secretary of the Interior directed that the decision of June 17, 1959, be vacated and ordered a hearing "on the merits."

At the hearing, held on September 8 and 9, 1959, it was shown, in addition to most of the facts recited, that Richfield had entered into a contract to sell and deliver a large volume of natural gas to the Southern California Edison Company's Mandalay plant and that to fulfill the contract Richfield had built a 58-mile pipeline, including the 21-mile stretch across public lands; that the pipeline had been completed and was being used by Richfield to deliver gas to the Edison Company.

On February 12, 1960, the hearing examiner submitted a recommended decision ordering Richfield to file a common carrier transportation tariff with the Bureau of Land Management within 30 days after receiving the decision.

In his decision of January 16, 1961, Assistant Secretary Abbott found that Richfield has indicated that it "intends to comply with the law and, more specifically, that it will operate its pipeline as a common carrier in accordance with the provisions of the Mineral Leasing Act" and that Richfield has complied with all of the requirements of the Department for the issuance of the requested right-of-way. He found it unnecessary to determine whether Richfield has misconstrued the common carrier requirements of the Mineral Leasing Act as the Department understands those requirements, saying:

* * * The law provides only that these conditions be attached to the right-of-way permit when it is issued, and does not require that an applicant must first meet or partially meet such conditions before the Department can issue a permit or grant. We cannot anticipate noncompliance.

Mr. Abbott concluded:

Should Richfield violate any of the conditions of its right-of-way, a simple and quick remedy is made available by the statute, i.e., an action in Federal District Court for forfeiture of the grant, which provides adequate protection of the public interest.

This conclusion seems to suggest the possibility of an action to cancel the right-of-way grant because of a violation of the common carrier obligation by Richfield. However, the decision expressly refrains from any attempt to indicate what that obligation involves. I am willing to concur that the appropriate procedure to secure enforcement of the common carrier obligation is the one mentioned in the decision and set forth in section 28 of the Mineral Leasing Act. I think it is inappropriate, however, to suggest the possibility of a judicial action to forfeit the grant of a right-of-way without indi-

eating upon what basis such an action would be brought. If the Department has a view as to the meaning of the common carrier obligation, I believe that view should be made unmistakably clear so that there will be no misunderstanding as to the basis upon which the Department is granting the right-of-way and will seek enforcement of the common carrier obligation.

The Department's position has been clear that section 28 provides for the grant of a pipeline right-of-way upon two separate conditions: (1) "that such pipe lines shall be constructed, operated, and maintained as common carriers," and (2) that such pipe lines "shall accept, convey, transport, or purchase without discrimination, oil or natural gas produced from Government lands in the vicinity of the pipe line in such proportionate amounts as the Secretary of the Interior may, after a full hearing with due notice thereof to the interested parties and a proper finding of facts, determine to be reasonable."

The Department's interpretation is based not only on the language of section 28 but on its legislative history. This history shows that, as originally enacted, section 28 contained only the common carrier obligation. The common purchase obligation was added by the act of August 21, 1935 (49 Stat. 674). The history of that amendment shows that the Department considered it to "expand" the common carrier requirement and not to limit it, and this was also the view of witnesses testifying on the amendment.²

The Department has adhered to its interpretation since 1935. Most recently, the Department reiterated its views in its report on legislation amending the common carrier requirement (act of August 12, 1953, 67 Stat. 557).³ The Department said in its report dated July 6, 1953:

Section 28 of the Mineral Leasing Act provides, in substance, that oil and gas pipelines which cross the public domain by virtue of rights-of-way granted by the Secretary of the Interior shall be common carriers, and contains *further* provisions to the effect that they must either carry or purchase the oil or gas produced from Government lands in the vicinity of the pipelines. (S. Rept. No. 578, 83d Cong., p. 2; emphasis added.)

Richfield urges that section 28 expresses only a single obligation, namely, that a pipeline must be constructed and operated as a common carrier but that its obligation as a common carrier is limited to the transportation or purchase of oil or gas produced from Government land in the vicinity of the pipeline. In other words, Richfield

² Department's report of February 26, 1935, on S. 1772, 74th Cong. (S. Rept. No. 1158 and H. Rept. No. 1747, 74th Cong.); Hearings on S. 1772, Senate Committee on Public Lands, pp. 91, 180. The report and testimony were directed to S. 1772 which was later superseded by S. 3311, the bill that became the act of August 21, 1935.

³ This amendment added the proviso that the common carrier provision shall not apply to any natural gas pipeline subject to regulation under the Natural Gas Act or by a State or municipal regulatory agency. Richfield does not fall in either category.

July 26, 1961

contends that the 1935 amendment of section 28 did not add a new obligation but merely limited and restricted the existing common carrier requirement. Richfield further asserts that the limited common carrier obligation that it contends for is only a condition subsequent attached to the grant of a right-of-way, that the holder of the right-of-way has no obligation to perform the condition until an aggrieved producer makes a complaint to the Secretary, a hearing is held, and the Secretary issues an order directing the transportation. In that event, the owner of the pipeline can either comply or refuse. If he refuses, the Secretary can then only bring an action in the United States district court to forfeit the right-of-way.

Under Richfield's view, the scope of the common carrier obligation is defined by the common purchase provision. Under the Department's view that the two obligations are separate, the common carrier obligation has a different meaning. Precisely what this meaning is has not been defined by the courts or by Congress. Thus, in *Montana-Dakota Utilities Co. v. Federal Power Commission*, 169 F. 2d 392 (8th Cir. 1948), cert. den. 335 U.S. 853, the plaintiff gas company, which held pipeline rights-of-way under section 28, sought to set aside orders of the Commission requiring it to file rate schedules for the common carrier transportation of natural gas in interstate commerce. The court sustained the orders. In answer to plaintiff's contention that it was not a common carrier "unless it be as a common law common carrier," the court said:

We think it is a *statutory* common carrier obligated to the public pursuant to its commitments under the Leasing Act, *supra*. * * *

The understanding of petitioner and of the Secretary of the Interior as to the meaning of § 28 of the Leasing Act, *supra*, is clearly shown by a stipulation entered into on December 17, 1934, in connection with petitioner's application for right-of-way permits for gas pipe lines over public lands in Montana, North Dakota and South Dakota wherein applicant "expressly consents and agrees that its pipe line shall be constructed, operated, and maintained as a common carrier * * * and further expressly consents and agrees to purchase and/or transport oil or gas available on Government lands in the vicinity of its pipe line * * *."

It is too clear for argument that the petitioner, having applied for and accepted a permit to do so and having constructed its pipe line over the public lands, became and is a *statutory* common carrier of natural gas * * *. That petitioner prefers not to assume the burdens of a common carrier for the transportation of natural gas in interstate commerce through its pipe lines is immaterial. (pp. 396-397; emphasis added.)

On the other hand, the court in *Chapman v. El Paso Natural Gas Company et al.*, 204 F. 2d 46 (D.C. Cir. 1953), said: "As for section 28, in the absence of more specific language by Congress, we regard the condition that pipe lines be constructed, operated, and maintained as

'common carriers' to embrace the common law meaning of the term" (p. 51).⁴

Whatever may be the difference between a statutory common carrier and a common law common carrier and whatever may be the maximum extent of the obligations imposed upon a common carrier, this Department is of the view that, at a minimum, the holder of a right-of-way for a natural gas pipeline under section 28 obligates itself to carry gas for someone other than itself and regardless of whether the gas is produced from Government land. It would be farcical to say that it is fulfilling its obligation if it constructs and operates its pipeline solely to transport its own gas. To so hold would be to strip the common carrier provision of any meaning.

The Department wishes to make it clear that the grant of the right-of-way is made to Richfield in accordance with this view, and that the Department will seek enforcement of the common carrier obligation in accordance with this view.

Subject to this understanding, the decision of January 16, 1961, is affirmed.

JOHN M. KELLY,

Assistant Secretary of the Interior.

⁴This statement lends direct support for the Department's position that the common carrier obligation is not defined by the common purchase provision. If the court had thought it was so defined, as Richfield contends, the court would not have said that there was an "absence of more specific language by Congress" defining the obligation, thus making it necessary to ascribe to the term "common carrier" the common law meaning of the term.

Also, the stipulation quoted above in the *Montana-Dakota Utilities Co.* case, which, the court said, showed the understanding of the pipeline company and the Secretary as to the meaning of section 28, clearly demonstrated that the common purchase obligation was deemed to be additional to the common carrier obligation.

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59. Under a contract for the placement of a gravel blanket overlain by riprap, the contractor is not entitled to additional compensation for (a) removing spalls, gravel, dirt and vegetative matter from riprap that in its natural state, as ascertainable by a reasonable site investigation, contains more of such extraneous material than is permissible under a proper interpretation of the specifications, even though the riprap is taken from sources that are described in the specifications as containing rock "suitable for riprap," or (b) complying with instructions as to the procedures to be used in placing and smoothing riprap, given by an authorized representative of the contracting officer, in the absence of satisfactory proof that the results called for by the specifications could have been achieved at less expense through the use of other procedures. 58
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61. The protests clause customarily inserted in Bureau of Reclamation construction contracts does not apply to a ruling that is communicated to the contractor for the first time in a decision made under the "Disputes" clause of the contract, and from which a timely appeal is taken. 58
62. A claim based on the failure of the Government to close a road pursuant to the terms of a contract for the construction of structures under or beside such road is a claim for breach of contract, but a claim based on a sequence of work ordered by the Government in order to mitigate the consequences of such failure may amount to a claim for a change in the contract specifications. No price adjustment on account of such a change, however, is allowable for (a) stoppage by the Government of operations being performed by the contractor that contravene oral instructions concerning the sequence of work, where the contractor had not observed the procedure established by the contract for protesting oral instructions; (b) operations performed on the contractor's own initiative, where such operations were occasioned by the failure to close the road rather than by the sequence of work ordered; and where their performance was not compelled by either of these acts of the Government; or (c) increased super-

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vision expense incident to a prolongation of the performance period that is caused by the Government's instructions concerning the sequence of work-----

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63. Claims for remission of liquidated damages on account of delays in completing a contract are not allowable if based on (a) weather conditions that were not unusually severe for the locality and season involved, (b) circumstances not within the scope of the claim as described in an exception to the release on contract, or (c) failure of the delays to cause actual loss to the Government if there was a reasonable possibility of such loss when the contract was made-----

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64. An exception in a release taken by a contractor during the appeal period is not a proper substitute for a notice of appeal-----

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65. A contractor is barred from asserting a claim in excess of the amount reserved in the release on contracts-----

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66. Under a supply contract Default Clause, a delay caused by manufacturing difficulties encountered by a second-tier subcontractor is not excusable to the prime contractor, since that cause is not among the illustrative examples in the Default Clause and is not equatable to such examples-----

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67. Claims for remission of liquidated damages on account of delays in completing a contract are not allowable if based on (a) weather conditions that were not unusually severe for the locality and season involved, (b) circumstances not within the scope of the claim as described in an exception to the release on contract, or (c) failure of the delays to cause actual loss to the Government if there was a reasonable possibility of such loss when the contract was made-----

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1. An applicant can gain no right to public land because he may have been misinformed by the land office that the land was available--

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HOMESTEADS (ORDINARY)

(See also *Additional Homesteads, Enlarged Homesteads, Reclamation Homesteads, Soldier's Additional Homesteads, Stock-raising Homesteads.*)

GENERALLY

1. Congress had as its purpose, in enacting the Act of August 9, 1912 (37 Stat. 265; 43 U.S.C. 541) the goal of affording reclamation homestead entrymen and water-right applicants vested rights to land and water so that they could raise money to finance farming activities-----

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2. Under the Departmental regulations governing private contests, a sufficient contest charge against a homestead entry must allege facts which, if proved, would require cancellation of the entry---

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| 3. An allegation in a private contest that a settler on unsurveyed land "has not posted his entry adequately for the public to be aware of it" and "has not blazed a trail or corner markers to said property" is a sufficient allegation that the settler has failed to mark the claim by permanent monuments at each corner as required by the statute authorizing settlement on unsurveyed land in Alaska..... | 100 |

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| 4. The provision of the act of July 17, 1914 requiring that a bond be filed with the Secretary for the protection of the owner of surface rights before prospecting can be undertaken requires that such a bond must be filed before a noncompetitive lease can be issued or an assignment approved..... | 169 |
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| 5. A notice of location of a homestead settlement is properly rejected where at the time it is made the land involved is withdrawn from settlement..... | 81 |
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INDIAN ALLOTMENTS ON PUBLIC DOMAIN**GENERALLY**

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| 1. Where the Department has held that part of the land, in Alaska, included in a notice of settlement location or occupancy is in a prior approved Indian allotment to an allottee, now deceased, and where the settler has built improvements on the land in conflict which he continues to occupy, the initiation and prosecution of the steps necessary to convey the land to the settler or remove him from it are to be undertaken by the Bureau of Indian Affairs which has the responsibility for determining heirs and supervising conveyances of allotted land, not by the Bureau of Land Management, and instructions issued by a land office of the Bureau of Land Management setting a 90-day period within which the settler must reach an agreement with the heirs of the allottee or be removed from the land are set aside..... | 78 |
| 2. Where a hearing has been held on instructions of the Director, Bureau of Land Management, to determine factual matters in connection with an application for an Indian allotment and where the protestant whose allegations were instrumental in causing the hearing to be held is not notified of the hearing and thereafter submits affidavits contradicting in all material matters the applicant's statements, the affidavits cannot be made part of the record, but the hearing will be reopened to permit the protestant to submit evidence..... | 248 |

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2. Where a patent in fee failed to recite the oil and gas reservation provided by the Act of March 3, 1927, 44 Stat. 1401, for the benefit of the Indians having tribal rights on the Fort Peck Reservation, subsequent purchasers of the fee patented land were nevertheless charged with notice of such reservation..... 75

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4. An agreement relating to restricted Indian lands which has not been given departmental approval is null and void, and a claim based upon it will not be allowed against a restricted Indian estate.... 122
5. It is discretionary with the Secretary of the Interior or his authorized representative as to whether to pay from restricted Osage funds a widower's or family allowance ordered by the Oklahoma State courts..... 177

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7. A purchaser of Indian lands is entitled to rentals paid by a lessee of the lands when the invitation for bids under which the purchase was made so provides, and this right is unaffected by the date when title to the land passed by patent in fee..... 154

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1. Where the contracting officer's findings are based on a presumption that subsistence payments are included in increased wage rates and are therefore not eligible for escalation payments, because previous union labor agreements with the contractor contained subsistence provisions which were absent from the new union labor agreements providing for increased wage rates, such presumption is founded on circumstantial evidence and is rebutted by the contractor's evidence that subsistence requirements had ceased as to his employees who had been provided with housing and other facilities and who had become residents at the job site, and further evidence that the increased wage rates were essential to settlement of a prolonged strike and for attracting sufficient labor supply to the job site in a desert area----- 1
2. Where a request for reconsideration of a decision of the Board is not persuasive of error by the Board, the decision will be affirmed. Where the Board finds on reconsideration that its prior decision was in error as to the amounts equitably payable under a labor escalation clause, the Board will modify its decision accordingly-- 363

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1. An application for an acquired lands noncompetitive oil and gas lease is not properly rejected as not being in the public interest where the United States acquired the land subject to the reservation in the grantor of a perpetual royalty of 12½ percent in the oil, gas, and other minerals produced from the land, merely because, upon production from the leasehold, no royalties would be payable to the United States as the royalties reserved to the grantor are deductible from the total 12½ percent royalty payable to the United States under such a lease----- 322

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5. Where an applicant for a mineral patent has shown no more than that there are bodies of low-grade minerals on his claims and has not shown that there is a reasonable expectation that the minerals exposed on the claims lead to minerals of greater value or that they exist in quantities which would cause a prudent man to expend his time and money in developing the claims, the applicant is not entitled to a mineral patent.....
6. A valid discovery under the mining laws requires more than the finding of mineral indications which would not warrant development work but only further exploratory work to determine if a valuable mineral deposit exists in the claim.....

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7. Where land is classified as suitable for disposition as a small tract pursuant to an application filed by an applicant who gains a preference right to a lease or purchase of the tract as a result of the classification, a mineral location made after the application was filed but before the land was classified becomes invalid.....
8. The fact that land is covered by a small tract application or that the Department on its own initiative is considering it for disposition as a small tract does not remove it from mineral location.....
9. Where the land office has been notified that land is under consideration for small tract purposes prior to the filing of a small tract application, the land remains open to mineral location and a later small tract classification will not render invalid an otherwise valid mining claim located prior to that classification.....
10. Lands first temporarily withdrawn from all forms of entry and disposal under the public land laws in aid of legislation for restoration to tribal ownership and later again temporarily withdrawn from any kind of disposal pending determination of whether they should be restored to tribal ownership are not thereafter subject to mineral location.....
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4. An operator under an oil and gas lease, whose rights to develop the land and dispose of the oil and gas produced are dependent upon the consent of the record title holder, does not have such effective direct control over the leases that it must be charged with the acreage therein as the real party in interest.....
5. In the absence of a withdrawal of an oil and gas lease offer, the offeror is charged with the acreage of his offer or simultaneously filed offers until the decision of the land office rejecting the offer or offers becomes effective at the end of the period for taking an appeal..
6. Where oil and gas offers are rejected because they did not draw top priority at a drawing of offers simultaneously filed and new offers are filed before the first offers are withdrawn or the time period has run for appealing from the rejection of the first offers, the new offers must be rejected if they together with the first offers exceed the acreage limitation prescribed by regulation.....

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2. The fact that land is covered by a small tract application or that the Department on its own initiative is considering it for disposition as a small tract does not remove it from mineral location.....
3. Where the land office has been notified that land is under consideration for small tract purposes prior to the filing of a small tract application, the land remains open to mineral location and a later small tract classification will not render invalid an otherwise valid mining claim located prior to that classification.....

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1. The phrase "San Luis Unit," as used in Section 1 of the Act of June 3, 1960 (74 Stat. 156), does not include any lands outside the Federal San Luis Unit Service area. The phrase does not embrace the State service area. The provisions of Section 1 of the foregoing Act, requiring the application of reclamation law to the "San Luis Unit," requires application of reclamation law only to the Federal San Luis unit service area.....
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1. In a proceeding under section 5(c) of the act of July 23, 1955, to determine the rights of a mineral claimant to the surface resources of his mining claim, it must be shown that there has been a valid discovery within the meaning of the mining laws made within the limits of his claim to prevent its being subjected to the terms and limitations of section 4 of that act..... 250

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2. The phrase "San Luis Unit," as used in Section 1 of the Act of June 3, 1960 (74 Stat. 156) does not include any lands outside the Federal San Luis Unit Service area. The phrase does not embrace the State service area. The provisions of Section 1 of the foregoing Act, requiring the application of reclamation law to the "San Luis Unit," requires application of reclamation law only to the Federal San Luis unit service area..... 412

